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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1286. ~~888~~ 455

ROBERT W. WATERMAN, APPELLANT,

vs.

PHILANDER M. ALDEN AND GEORGE S. ROBINSON, INDIVIDUALLY AND AS EXECUTORS OF JAMES S. WATERMAN, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 3, 1889.

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1 Pleas in the circuit court of the United States of America for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, on Monday, the twenty-second day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the one hundred and fourteenth year.

WM. H. BRADLEY, *Clerk.*

ROBERT W. WATERMAN
vs.
PHILANDER M. ALDEN and GEORGE S. ROBINSON, Individually and as Executors of the Last Will and Testament of James S. Waterman, Deceased. } In Chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the fourth day of June, 1886, came the complainant, by his solicitor, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, his bond for costs and bill of complaint in said entitled cause; which said bond and bill are in the words and figures following, to wit:

2 *Bond for Costs.*

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

Circuit Court. July Term, A. D. 1886.

ROBERT W. WATERMAN
vs.
PHILANDER M. ALDEN, GEORGE S. ROBINSON; Philander M. Alden and George S. Robinson, Executors of the Last Will and Testament of James S. Waterman, Deceased. } In Equity.

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the complainant of any costs ordered or adjudged to be paid by him I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this 4th day of June, A. D. 1886.

WILLIAM R. PLUM.

(Endorsed:) Filed June 4, A. D. 1886. Wm. H. Bradley, clerk.

3 UNITED STATES OF AMERICA,
Northern District of Illinois:

United States Circuit Court for the Northern District of Illinois, in Chancery Sitting.

To the judges of the circuit court of the United States for the district of Northern Illinois:

Robert W. Waterman, of San Bernardino county, California, and a citizen of the State of California, brings this his bill against Philander M. Alden and George S. Robinson, of Sycamore, Illinois, citizens of the State of Illinois, and said Philander M. Alden and George S. Robinson, as executors of the last will and testament of James S. Waterman, late of De Kalb county, Illinois, deceased.

Thereupon your orator complains and says that on, to wit, the nineteenth day of July, A. D. 1883, James S. Waterman, late of Sycamore, in De Kalb county, Illinois, and a citizen thereof, departed this life within said State of Illinois, leaving his certain last will and testament, which has been duly admitted to probate in the county court of said De Kalb county; that Philander M. Alden and George S. Robinson, in said will nominated and appointed executors thereof, have duly qualified and are still acting as such.

Your orator further represents that upon the demise of said James S. Waterman he left an estate valued at exceeding five hundred thousand dollars; that by his said will, dated November 28th, A. D. 1870, besides providing for his debts, funeral expenses,
4 and certain legacies, he gave and devised the bulk of his estate to said Alden and Robinson, as trustees for the brothers (including your orator) and sisters of decedent, all of which will more particularly appear by said will, a true copy of which is hereto attached, marked "Exhibit A," and made a part hereof; that the seventh item or clause of said will provides as follows: "7th. I desire and direct that any and all notes, bills, accounts, agreements, or other evidences of indebtedness against any of my said brothers or sisters held by me at the time of my decease be cancelled by my said executors and delivered up to the maker or makers thereof without payment of the same or any part thereof, except two notes I hold against John C. Waterman—one for eight thousand dollars, dated August 10th, 1870, and due January 1st, 1871, and one for four thousand and six hundred dollars, dated November 28th, 1870, and due six months after date, and both secured by trust deed upon lands in Johnson county, State of Missouri—which notes I desire and direct to be collected and equally divided between my said brothers and sisters, the child or children of a deceased brother or sister to take the same share father or mother would have taken if living."

Your orator further represents that over two years prior to the death of said James S. Waterman one John L. Porter and your orators became associated together in certain mining enterprises or business in the said State of California, and carried on the business under the name and style of Waterman & Porter; that your orator's interest

therein was and still is to the extent of three-fourths thereof, and that of said Porter of one-fourth thereof; that your orator bore three-quarters of all of the costs, outlays, and expenses of said enterprises
5 or business, and said Porter the remaining quarter; that in the conduct of said business it became desirable to borrow certain large sums of money of said James S. Waterman; that your orator and said Porter gave their certain promissory notes or other evidences of indebtedness against each of them; that they also obtained certain goods, wares, and merchandise upon open account with said James S. Waterman; that among funds so obtained were the sums as follows, viz., seven thousand five hundred dollars on or about August 14th, 1881, evidenced by the certain note of your orator and said Porter, by the name and style of Waterman & Porter aforesaid, and payable to the order of said James S. Waterman; also one thousand dollars on or about October 20th, 1881, evidenced by the certain note of your orator and said Porter, by the name and style of Waterman & Porter, and payable to the order of said James S. Waterman; also five hundred dollars on or about November first, 1881, evidenced as last aforesaid; also five hundred dollars on or about November 11th, 1881, evidenced as last aforesaid; also five hundred dollars on or about November 22nd, 1881, evidenced as last aforesaid, aggregating the sum of ten thousand dollars; that all of said notes bore interest at the rate of eight per cent. per annum until paid; all of which will more fully appear by reference to said notes, to be produced at the hearing hereof, and by copies thereof, hereto attached and made a part hereof and marked, respectively, "B," "C," "D," "E," and "F;" that prior to the giving of said notes others, mainly of similar tenor and effect, except as to the amounts and time of payment, were given said James S. Waterman by your orator and said Porter, under the name and style of Waterman & Porter aforesaid, which had been paid prior to the de-
6 mise of said James S. Waterman, except a further interest claim therein of one hundred and twenty dollars.

That said James S. Waterman's books of account at the time of his death showed certain items of charges against your orator and said Porter, under the name and style of Waterman & Porter, for cash paid for paper, for suits of clothes for your orator, for express charges, for goods to Snoderly, for expenses to and from San Bernardino, for paper, and for one coat, aggregating the sum of three hundred and eighty-nine dollars and five cents.

And your orator further represents that all of said notes and accounts were notes, accounts, and evidences of indebtedness against your orator and held by the said James S. Waterman against your orator at the time of the decease of said James S. Waterman, who, your says, was a brother of his, your orator's, both having the same father and mother.

Your orator further represents that the aggregate of said several sums, including interest on said notes B, C, D, E, and F, is the sum of eleven thousand nine hundred and forty-nine dollars and fifty-one cents, which said sum your orator caused to be remitted and paid as follows: First, by draft for eleven thousand five hundred and

four dollars and fifty-one cents, dated September 12th, 1883, and drawn by the Bank of California on the Union National Bank of Chicago, payable to the order of said "P. M. Alden on account of the estate of J. S. Waterman" aforesaid, which said draft was deposited in the United States mail, addressed to said Alden, on the said 12th of September, and duly honored; and, second, by exchange drawn upon said Bank of California, February 8th, 1884, for four hundred and forty-five dollars against the agency of the Bank
7 of California, 14 Wall St., New York, and payable to the order of said P. M. Alden, executor of the estate of J. S. Waterman aforesaid, as shown by Exhibits "G" and "H," hereto attached and made part hereof, by copy.

Your orator further represents that although the said will was in the custody and control of said Philander M. Alden and George S. Robinson or of the said Alden, and both knew the contents thereof at or about the time of the death of said James S. Waterman and long prior to the payment of said sum of eleven thousand five hundred and four dollars and fifty-one cents, and although the said Alden well knew the contents of said will, and especially the provisions in item or clause seven aforesaid, and was in correspondence with your orator relative to the estate of said James S. Waterman and the management and control thereof between the death of said James S. Waterman and the payment aforesaid, neither he, the said Alden, nor the said George S. Robinson informed your orator or said John L. Porter anything concerning the said seventh item or clause, but kept wrongfully and in bad faith neglected to advise your orator or said Porter thereof, and left him and said Porter in complete and utter ignorance thereof, and your orator did not know, nor did said Porter, of said clause or item seven or any of the provisions thereof until long after he, your orator, had caused the said sum of eleven thousand five hundred and four dollars and fifty-one cents to be sent and paid as aforesaid.

Your orator further says that immediately upon learning of the provisions in said item or clause seven he wrote to said Alden, claiming a right to a return of said money so paid by mis-
8 take and in ignorance of the facts, without which your orator says the same would not have been paid, but the said Alden replied that he had consulted counsel learned in the law, who advised him that the said will did not release your orator from his former liability, and your orator says that he and said Porter were ignorant of the laws of the foreign or sister State of Illinois aforesaid in that regard, but your orator says that after making all the payments aforesaid in ignorance of his rights in the premises he was induced to consult counsel in the said State of Illinois regarding the provisions of said item or clause seven; and, being advised that said will absolutely required the surrender of said obligations and evidences of indebtedness against your orator without payment, he with all reasonable dispatch caused further demands to be made upon all of the defendants hereto for the return of the said several sums paid as aforesaid, but they and each of them have utterly neglected and refused to pay the same or any portion thereof and wrongfully claim

and pretend that the said will did not authorize or direct the executors thereof to surrender said notes, accounts, and evidences of indebtedness to your orator or to your orator's said firm.

Further, your orator represents that said several sums paid as aforesaid have been wrongfully mixed with the estate of said James S. Waterman, deceased, in the names of said executors as such.

Your orator further says that said widow of said decedent has renounced the provisions of said will in her behalf and elected to take the share of said estate allowed by law in such cases made and provided; that all of the other specific legacies have been
9 satisfied except that coming to your orator under said clause or item seven, and all debts and other claims fully paid, except also such others as may remain unsatisfied by reason of contest or other excuse; that said estate was and is solvent and amply and abundantly able to pay all debts whatsoever, costs of administration, and other charges or claims, including subsisting legacies, general and specific, contemplated or provided for in the said will, without the necessity for the payment of said notes and evidences of indebtedness against your orator as aforesaid.

Your orator further says that the administration of said estate is still pending and unsettled in the county court of De Kalb county aforesaid.

To the end, therefore, that the said defendants may be required to make as full and direct answer to this bill as if specially interrogated, but without oath, the same being hereby expressly waived as to each of said defendants, and that said Philander M. Alden and George S. Robinson, as individuals and in their representative capacities aforesaid, be ordered and decreed to pay unto your orator all of said moneys paid as aforesaid, with interest thereon, and to fully execute the trusts of said will in this behalf, and that they in the meantime be restrained from disposing — said funds or any portion thereof, and that your orator may have such other, further, and different relief as to equity may appertain and to your honor seem meet—

May it please your honor to grant the writ of summons in equity directed to the marshal of said district, commanding him that he summon said defendants to appear before said court on the first day of next term thereof, to be held at the court-house in
10 Chicago, Illinois, then and there to answer this bill.

And your orator will ever pray, etc.

ROBERT W. WATERMAN.

WILLIAM R. PLUM,
Solicitor and of Counsel

11 EXHIBIT "A."

I, James S. Waterman, of the city of Sycamore, in the county of De Kalb and State of Illinois, of the age of fifty years and being of sound mind and memory, do make, publish, and declare this my last will and testament in manner following—that is to say:

1st. I desire and direct that all my just debts be paid without unnecessary delay.

2nd. I give, bequeath, and devise to my beloved wife, Abbie L. Waterman, her heirs and assigns forever, one-third of all my estate, both real and personal.

3rd. I give and bequeath to Philander M. Alden, of the city of Chicago and State of Illinois, one of the executors of this my last will and testament, hereinafter nominated and appointed, in trust, for the use and benefit of Nellie Farnhdon, of Sycamore and State aforesaid, the sum of five thousand dollars, to have, hold, manage, and control the same for such purpose for and during the term of twenty-one years from and after the date of my decease, and that during the continuance of said trust estate as aforesaid to invest said amount to the best advantage for the said Nellie Farnhdon and receive, collect, and pay over to her, and in case of her death to her children or for their benefit, the interest or net income and profits thereof annually, and at the expiration of the said twenty-one years after my decease I give and bequeath to the said Nellie Farnhdon, her heirs and assigns forever, the said sum of five thousand dollars; but in case of the death of the said Nellie Farnhdon leaving no issue, then the interest or net income and profits thereof to be paid to my brothers and sisters, to wit, John C. Waterman, of Sycamore; Charles Waterman, of Freeport; Robert W. Waterman, of Mount Vernon, and Charlotte Waterman, of Sycamore, State of Illinois; Mary Wells, wife of Timothy D. Wells, of the State of Kansas, and Sarah E. Waterman, widow of Henry F. Waterman, deceased, of Rome, in the State of New York, in equal portions to each; the child or children of any deceased brother or sister to receive the same portion the father or mother would have received if living, and at the expiration of the said twenty-one years after the date of my decease the said sum of five thousand dollars I give and bequeath to my said brothers and sisters, their heirs and assigns forever, to be equally divided between them, share and share alike; the child or children of any deceased brother or sister to take the same share the father or mother would have taken if living, and in case of the death of any of said brothers or sisters leaving no issue the share such deceased brother would have taken if living to be equally divided among my said surviving brothers and sisters.

4th. I give, bequeath, and devise all the rest, residue, and remainder of my estate, both real and personal, to the said Philander M. Alden and George S. Robinson, of Sycamore, Illinois, the executors of this my last will and testament, hereinafter nominated and appointed, in trust for the use and benefit of my said brothers and sisters, to wit, John C. Waterman, Charles Waterman, Robert W. Waterman, Charlotte Waterman, Mary Wells, and Sarah E. Waterman, to have, hold, manage, and control the same for such purpose for and during the term of twenty-one years from and after the date of my decease, and that during the continuance of said trust estate as aforesaid to receive, collect, and pay over to my said brothers and sisters above named the net income and profits thereof in equal por-

tions to each annually, the child or children of a deceased
13 brother or sister to take the same portion the father or mother would have taken if living, and at the expiration of said twenty-one years after my decease I give, bequeath, and devise to my said brothers and sisters, their heirs and assigns forever, the said rest, residue, and remainder of my estate, both real and personal, to be equally divided between them, share and share alike, the child or children of any deceased brother or sister to take the same share the father or mother would have taken if living, and in case of the death of any of my said brothers or sisters leaving no issue the share such brother or sister would have taken if living to be equally divided among my surviving brothers and sisters.

5th. In case I should survive my beloved wife, Abbie L. Waterman, then, and in that event only, I give and bequeath to Marcia Smith, wife of George H. Smith, of Mount Holyoke, State of Massachusetts, her heirs and assigns forever, the sum of five thousand dollars, and I give and bequeath the sum of twenty-five hundred dollars to Nellie L. Babcock, of Sycamore, State of Illinois, her heirs and assigns forever; and I give and bequeath also the sum of twenty-five hundred dollars to Jennie R. Cushman, of the same place, her heirs and assigns forever, to be paid out of that portion of my estate hereinbefore given, bequeathed, and devised to my said wife, and the rest and residue thereof I hereby give, bequeath, and devise to my said executors in trust for the use and benefit of my said brothers and sisters named in item four of this my last will and testament, to have, hold, manage, and control the same as specified therein and for and during the term therein specified, and the net income and profits thereof to be received, collected, and paid over
14 under the same directions and to the same persons as therein specified, and at the expiration of the said twenty-one years after my decease I give, bequeath, and devise to my said brothers and sisters named in item four of this will, their heirs and assigns forever, the said residue of that portion of my estate hereinbefore given, bequeathed, and devised to my said wife, Abbie L. Waterman, to be equally divided between them, share and share alike, the child or children of any deceased brother or sister to take the same share the father or mother would have taken if living; and in case of the death of any of my said brothers or sisters leaving no issue, then the share such deceased brother or sister would have taken if living to be equally divided among my surviving brothers and sisters.

6th. I desire and direct that my executors hereinafter nominated and appointed and they are hereby empowered to partition and set off to my beloved wife, as soon as practicable after my decease, that portion of my estate herein given, bequeathed, and devised to her; and they are hereby also empowered to sell and dispose of the remainder of my estate at public or private sale, at such time or times and upon such terms and in such manner as to them shall be deemed for the best interest of my said estate, and invest the proceeds arising from such sale or sales for the benefit of my said brothers and sisters, subject to the same regulations as hereinbefore specified for the management and control of my said estate.

7th. I desire and direct that any and all notes, bills, accounts, agreements, or other evidences of indebtedness against any of my said brothers and sisters held by me at the time of my decease be cancelled by my said executors and delivered up to the maker or makers thereof without payment of the same or any part thereof, except two notes I hold against John C. Waterman, one for eight thousand dollars, dated August 10, 1870, and due January 1st, 1871, and one for four thousand and six hundred dollars, dated Nov. 28th, 1870, and due six months after date, and both secured by trust deed upon lands in Johnson county, State of Missouri, which notes I desire and direct to be collected and equally divided between my said brothers and sisters, the child or children of a deceased brother or sister to take the same share the father or mother would have taken if living.

8th. I desire and direct that those persons who shall be indebted to me at the date of my decease, and whose claims are amply secured by mortgage or trust deeds on real estate, shall not be required by my said executors to make immediate payment thereof, and my said executors are hereby empowered to extend the time of payment of all such claims to such time or times as they may deem best, upon the payment to them of the interest thereon, according to the terms expressed in said claims, mortgage, or trust deeds, it being my desire not to oppress any man unnecessarily. My said executors are also authorized and empowered to give a reasonable time for the payment of other claims in their discretion, provided they can do so without prejudice to my said estate.

9th. And I hereby nominate and appoint Philander M. Alden and George S. Robinson to be the executors of this my last will and testament, hereby revoking all former wills by me made.

In witness whereof I have hereunto set my hand and seal this 28th day of November, A. D. 1870.

JAMES S. WATERMAN. [SEAL.]

The above instrument, consisting of eight pages, was at the date thereof signed, sealed, published, and declared by the said James S. Waterman as and for his last will and testament in presence of us, who, at his request and in his presence and in the presence of each other, have subscribed our names as witness- thereto.

S. ASHTON, Chicago, Ill.
J. B. COLE, Chicago.

SYCAMORE, ILL., *Dec. 7th*, 1872.

I now desire and do change the executor, George S. Robinson, and — his place appoint my brother, Robert W. Waterman, to act in all and every capacity the same had he been appointed at the time of this will being made. I also withdraw the amount of $2,500 as being left to Jennie R. Cushman, as she has since this will being made received from her uncle, Nelson Garrett, a fair sum and is now well married. I therefore annul and leave this will the same as if her name had not been mentioned.

JAMES S. WATERMAN.

STATE OF ILLINOIS, }
County of De Kalb. }

I, Cassius M. Conrad, clerk of the county court in and for the county and State aforesaid, do hereby certify that the foregoing is a true, full, and correct copy of a certain instrument of writing purporting to be the last will and testament of James S. Waterman, which was on the 24th day of July, 1883, filed in the office of said clerk for probate and by said court, on the 18th day of September, 1883, duly probated and admitted to record as and
17 for the last will and testament of the aforesaid James S. Waterman, late of said county, deceased, and recorded in Book of Wills No. 2, pages 154, '5, '6, and '7.

In witness whereof I have hereunto set my
[SEAL OF COURT.] hand and affixed the seal of said court, at Sycamore, in said county, this 3rd day of October, 1885.

CASSIUS M. CONRAD, *Clerk.*

18 "EXHIBIT B."

$7,500.00. SAN BERNARDINO, CAL., *Aug. 14th*, 1881.

On or before six months, at 3 o'clock p. m. of that day (no grace), for value received, we or either of us promise to pay James S. Waterman or order, at their banking-house, in this city, seven thousand five hundred dollars in gold coin of the Government of the United States, with interest thereon from date, at the rate of eight per cent., until paid, whether said payment be made at the time above mentioned or subsequent thereto, said interest to be paid monthly, in advance, and if not paid as it becomes due to be added to the principal and to become part thereof and to bear interest the same as the principal.

No. 9. WATERMAN & PORTER.

(Endorsed on the back:) Paid Sep. 12th; int. to Sep. 15th, 1883. Ex. on N. Y.

EXHIBIT "C."

$500.00. SYCAMORE, ILL., *Nov. 1st*, 1881.

On or before four months after date we promise to pay to the order of J. S. Waterman five hundred dollars, at Sycamore National Bank, value received, with eight per cent. interest, on draft received this day.

No. 11. WATERMAN & PORTER.

(Endorsed on back:) Paid Sep. 12th; int. to Sep. 15th, 1883. Ex. on N. Y.

19 EXHIBIT "D."

$500.00. SYCAMORE, ILL., *Nov. 11th*, 1881.

Ninety days after date *I* promise to pay to the order of J. S. Water-

man five hundred dollars, at San Bernardino, California, value received, with eight per cent. interest until paid.

No. 3. Draft 12. WATERMAN & PORTER.

(Endorsed on back:) Paid Sept. 12th; int. to Sep. 15th, 1883. Ex. on N. Y.

EXHIBIT "E."

$1,000.00. SYCAMORE, ILL., *Oct. 20th*, 1881.

On or before four months after date we promise to pay to the order of J. S. Waterman one thousand dollars, at Sycamore Nat'l Bank, value received, with eight per cent. interest until paid, for draft received this day.

No. 10. WATERMAN & PORTER.

(Endorsed on back:) Paid Sept. 12th; int. to Sept. 15, 1883. Ex. on N. Y.

EXHIBIT "F."

$500.00. SYCAMORE, ILL., *Nov. 22nd*, 1881.

Four months after date we promise to pay to the order of J. S. Waterman five hundred dollars, at San Bernardino, California, value received, with eight per cent. interest until paid.

No. 13. WATERMAN & PORTER.

(Endorsed on back:) Paid Sept. 12th; int. to Sept. 15th, 1883.

20 EXHIBIT "G."

The Bank of California.

$11,504.51. SAN FRANCISCO, *Sept. 12th*, 1883.

On demand of this first of exchange (second and third unpaid) pay to the order of P. M. Alden, acc't estate of J. S. Waterman, eleven thousand five hundred four $\frac{51}{100}$ dollars for value received, which charge to account with or without advice.

No. 5546. WILLIAM ALVORD, *President.*

To Union National Bank, Chicago.

[On margin:] Countersigned. J. P. Allen, exchange clerk.

(Endorsed on back:) Union National Bank. Paid Sep. 19, 1883, Chicago, Ill. P. M. Alden, for estate of J. S. Waterman. Pay Merchants' National Bank of Chicago or order for collection, acc't of Sycamore National Bank, Sycamore, Ill. P. M. Alden, cashier. Paid through Chicago clearing-house, Sep. 19, 1883, to the Merchants' Nat'l Bank.

EXHIBIT "H."

The Bank of California.

$445. SAN FRANCISCO, *Feb'y 8th*, 1884.

At sight of this duplicate of exchange (original unpaid) pay to the

order of P. M. Alden, ex'r of the estate of J. S. Waterman, four hundred forty-five dollars, value received.

21 No. 80483. B. MURRAY, JR., *C.*

To the agency of the Bank of California, 14 Wall St., New York.

Endorsed: Filed June 4, 1886. Wm. H. Bradley, clerk.

Afterward, to wit, on the eighth day of September, 1886, came the defendants, by their solicitors, and filed in said clerk's office their demurrer to the bill in said entitled cause; which said demurrer is in the words and figures following, to wit:

22 UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

In the Circuit Court of said District. In Equity.

ROBERT W. WATERMAN
vs.
PHILANDER M. ALDEN and GEORGE S. ROBINSON, Executors, &c. } Bill.

The demurrer of Philander M. Alden and George S. Robinson, executors, &c., to the bill of complaint of Robert W. Waterman, complainant.

These defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, do demur thereto, and for cause of demurrer show that the said complainant hath not by his said bill made such a case as entitles him in a court of equity to any relief from or against these defendants touching the matters contained in the said bill or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, these defendants demur to the said bill and to all the matters and things therein contained, and humbly pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, and they pray to be hence dismissed with their reasonable

23 costs in this behalf sustained.

PHILANDER M. ALDEN.
GEO. S. ROBINSON.

I certify that in my opinion the foregoing demurrer of Philander M. Alden and George S. Robinson, defendants, to the bill of complaint of Robert W. Waterman, complainant, is well founded in law and proper to be filed in the above cause.

JOHN P. WILSON,
Sol'r for Def'ts.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

Philander M. Alden, one of said executors, being duly sworn, says that he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

PHILANDER M. ALDEN.

Subscribed and sworn to before me this 2d day of September, 1886.

C. E. WALKER,
Notary Public. [SEAL.]

Endorsed: Filed Sep. 8, 1886. Wm. H. Bradley, clerk.

24 Afterward, to wit, on the twelfth day of January, 1887, came the defendants, by their solicitors, and filed in said clerk's office their answer to the bill in said entitled cause; which said answer is in the words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for the said Northern District of Illinois, in Chancery Sitting.

ROBERT W. WATERMAN, Complainant,
vs.
PHILANDER M. ALDEN & GEORGE E. ROBINSON, Individually and as Executors of the Last Will and Testament of James S. Waterman, Deceased. } Bill.

The answer of Philander M. Alden and George S. Robinson, individually and as executors of the last will and testament of James S. Waterman, deceased, to the bill of complaint of Robert W. Waterman.

These defendants, saving and reserving all benefit of exception to the said bill of complaint, for answer thereto say that they admit that James S. Waterman, late of Sycamore, in De Kalb county, Illinois, departed this life on the 19th day of July, 1883, leaving his last will and testament, which has been duly admitted to probate in the county court of De Kalb county, in the State of Illinois, and that these defendants were in said will nominated and appointed executors thereof, and that they have duly qualified and are
25 still acting as such, and that the estate left by said James S. Waterman, deceased, was of the value of about five hundred thousand dollars, and that said Waterman by his will gave and devised the bulk of his estate to these defendants as trustees for his brothers and sisters, and that the seventh item or clause of said will provides as in said bill stated.

These defendants, further answering, admit that said complainant and John L. Porter, prior to the death of said James S. Waterman, became associated together in certain mining enterprises in the State of California, and that said complainant and said Porter carried on their business under the name and style of Waterman & Porter, and that said complainant's and said Porter's interest in their joint business was as in said bill stated, and that in the conduct of the business of the said firm of Waterman & Porter said firm borrowed large sums of money of said James S. Waterman, for which they gave their firm notes, a correct list of which said notes is set up in said bill of complaint, and that prior to the giving of the notes specifically mentioned in said bill other notes had been given to said Waterman by said firm for money borrowed, which had been paid prior to the demise of said James S. Waterman.

These defendants, further answering, admit that said James S. Waterman's books of account at the time of his death showed certain items of charges against your orator and said Porter, under the name and style of Waterman & Porter, for cash paid for paper, for suit of clothes for said complainant, for express charges, for goods, and other items, as in said bill stated.

26 These defendants, further answering, admit that said complainant was the brother of said James S. Waterman.

These defendants, further answering, state that they admit that they received two drafts drawn by the Bank of California on the Union National Bank of Chicago to the order of said P. M. Alden on account of the estate of James S. Waterman—one for $11,504.51, dated September 12th, 1883, and the other for $445.00, dated February 8th, 1884—and that these defendants received payment of said drafts; but these defendants deny that said sums were paid to these defendants by said complainant individually, but, on the contrary, aver that said drafts were procured by said firm of Waterman & Porter with firm moneys and were paid to these defendants in discharge of the firm indebtedness due the estate of said John S. Waterman, deceased.

These defendants, further answering, say that said draft for $11,504.51 was sent to said Alden by said firm in payment of the notes of said firm due said Waterman's estate in said bill mentioned before either of these defendants had qualified as executors of said Waterman and without any request for payment by them or either of them; and these defendants deny that they wrongfully and in bad faith neglected to advise said complainant and said Porter of the provisions of said will, and they further deny that said complainant did not know of said clause or item seven in said will at the date of sending said draft for $11,504.51.

And these defendants, further answering, state that the second draft for $445.00 was sent to these defendants after said

27 Waterman had seen and read the will of James S. Waterman, deceased, and was fully advised of the contents thereof; and these defendants deny that said draft for $445.00 or any part thereof was in payment of any indebtedness due from said complainant individually, but that the whole amount thereof was in payment and

discharge of the balance of the notes due from said firm to said estate and was paid with full knowledge of all the provisions of the will of said James S. Waterman, deceased, and after consultation with counsel by said complainant.

These defendants, further answering, admit that they have been requested to return the several sums paid them by said firm, as in said bill stated, and that these defendants have refused and still refuse to comply with such request.

These defendants admit that the sums so paid them by said complainant have been accounted for by them as part of the estate of James S. Waterman in their hands, but deny that the mixture of said sums with the estate of said Waterman was fraudulent or wrongful.

These defendants, further answering, state that said partnership of Waterman & Porter was formed long after the execution by James S. Waterman of his will; that there was at the date of the execution of said will due said James S. Waterman from his brothers and sisters considerable sums of money in their own individual capacity, and that article seven of said will was intended to and did only refer to such individual indebtedness as might be due him from his brothers and sisters individually at the date of his death;

28 that at the date of the death of said James S. Waterman there was due to him from said complainant upon his individual promissory notes about the sum of $10,000.00, which notes were surrendered to said complainant without payment under the provisions of said section seven of said will.

These defendants, further answering, admit that the widow of said James S. Waterman has renounced the provisions of the will in her behalf; that the estate of said James S. Waterman is solvent and amply and abundantly able to pay all the debts of the said estate, together with the costs of administration, without the money so paid to these defendants by said complainant, and that the administration of the said estate is still pending and unsettled in the county court of De Kalb county aforesaid.

These defendants deny any and all other allegations in said bill not herein specifically answered, and pray to be hence dismissed with their reasonable costs.

PHILANDER M. ALDEN,
GEORGE S. ROBINSON,
By their solicitor, JOHN P. WILSON.

WILSON & MOORE,
Sol'rs and of Counsel for said Defendants.

Endorsed: Filed Jan'y 12th, 1887. Wm. H. Bradley, clerk.

29 Afterward, to wit, on the thirtieth day of June, 1887, came the complainant, by his solicitor, and filed in said clerk's office his replication to the answer of the defendants in said entitled cause; which said replication is in the words and figures following, to wit:

Replication.

UNITED STATES OF AMERICA,
Northern District of Illinois, } ss:

United States Circuit Court for the Northern District of Illinois, in Chancery Sitting.

ROBERT W. WATERMAN
vs.
PHILANDER M. ALDEN and GEORGE E. ROBINSON, Individually and as Executors of the Last Will and Testament of James S. Waterman, Deceased. } Bill.

The replication of Robert W. Waterman, complainant, to the answer of said defendants.

This repliant, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of said answer, for replication thereunto says that he will aver and prove his said bill to be true, certain, and sufficient in law to be answered unto, and that the answer of the defendants is uncertain, untrue, and insufficient to be replied unto, without this, that any
30 other matter or thing whatsoever in the said answer contained material or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

ROBERT W. WATERMAN,
By WILLIAM R. PLUM, *His Solicitor.*

W. R. PLUM, *Of Counsel.*

(Endorsed:) Filed June 30, 1887. Wm. H. Bradley, clerk.

31 Afterward, to wit, on the eighteenth day of June, 1888, came the complainant, by his solicitor, and filed in said clerk's office his motion in said entitled cause; which said motion is in the words and figures following, to wit:

Motion.

UNITED STATES OF AMERICA,
Northern District of Illinois, } ss:

U. S. Circuit Court for N. Dist. of Ills. Ch'y.

ROBERT W. WATERMAN
vs.
P. M. ALDEN *et al.* } Bill.

The complainant, by his sol'r, comes and moves the court to suppress all of the direct examination of P. M. Alden as shown in his

deposition after the following direct interrogatory, to wit: Question. "It is charged in the bill in this case that you wrongfully and in bad faith neglected to advise the complainant of the 7th clause of the will of James S. Waterman, and in that way induced him to pay the firm notes of Waterman & Porter. Now, what is the fact in that regard?"

ROBERT W. WATERMAN,
By W. R. PLUM, *Sol'r.*

(Endorsed:) Filed June 18, 1888. Wm. H. Bradley, clerk.

32 On the same day, to wit, on the eighteenth day of June, in the adjourned May term of said court, 1888, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

ROBERT W. WATERMAN
vs.
PHILANDER M. ALDEN *et al.* } In Chancery.

Now come the parties, by their solicitors, and now comes on to be heard the complainant's motion to suppress all of the direct examination of P. M. Alden as shown in his deposition after the following direct interrogatory, to wit: Question. "It is charged in the bill in this case that you wrongfully and in bad faith neglected to advise the complainant of the seventh clause of the will of James S. Waterman, and in that way induced him to pay the firm notes of Waterman & Porter. Now, what is the fact in that regard?" The defendants are ruled to close their proofs by the sixth day of August next, and the court reserves the question of the competency of the evidence.

33 Afterward, to wit, on the twenty-second day of April, in the adjourned March term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

ROBERT W. WATERMAN
vs.
PHILANDER M. ALDEN *et al.* } In Chancery.

By consent of parties, by solicitors, leave is given the complainant to amend his bill herein, the answer to original bill to stand to amended bill and replication to original answer to stand.

On the same day, to wit, on the twenty-second day of April, 1889, came the complainant, by his solicitor, and filed in said clerk's office his amendment to the bill in said entitled cause; which said amendment is in the words and figures following, to wit:

34 UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

Circuit Court of the United States. In Chancery.

ROBERT W. WATERMAN *vs.* PHILANDER M. ALDEN *et al.* } Bill.

And now comes said complainant and, by leave of court first obtained, amends his said bill immediately preceding the clause therein charging defendants with having wrongfully mixed said several sums with the estate of said James S. Waterman, deceased, by inserting the following:

Your orator further represents that on or about May 14, 1881, he made an agreement with said defendant, James S. Waterman, as security for the payment of any advances which he, the said James, might make to the complainant of mining property in California, of which the following is a correct copy:

"SAN BERNARDINO, *May* 14, 1881.

"For and in consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I hereby agree at any time within twelve months from this date, upon demand by J. S. Waterman or his heirs, administrators, or assigns, I will execute to him a good and sufficient deed of conveyance to an undivided twenty-four one-hundredths $\frac{24}{100}$ of the following mines, known as the Alpha, Omega, Silver Glance, and Front, each being 600 feet wide by 1,500 feet long, and the same interest in all lands that may be
35 located or has been located for the development of the above mines, with such machinery and improvements as is to be placed upon the same, all subject to the same proportion of expenses, which is to be paid out of the development of the above property, all situated near Grapevine, in the county of San Bernardino, State of California.

"(Signed) R. W. WATERMAN."

That the said agreement contained no defeasance clause, and your orator seriously feared a demand would be made for a conveyance of said $\frac{24}{100}$ interest, which was of the value of about a quarter of a million of dollars, and wherefore your orator, during the life of testator, ordered the payment of said indebtedness as soon as possible, and payment was made pursuant thereto; that said executors now claim that said instrument was assigned to Abbie L. Waterman by said James in his lifetime, of which your orator was ignorant when said payments were made.

Further, your orator says that although said draft for four hundred and forty-five dollars was sent after seeing said will it was forwarded, without complainant's knowledge, pursuant to instructions given before the death of testator or knowledge of said clause seven by your orator, and at a time when your orator was informed and believed the first draft paid all indebtedness, and after said Alden

had misrepresented to your orator his, your orator's, legal rights under said clause 7.

ROBERT W. WATERMAN,
By WILLIAM R. PLUM,
Solicitor and of Counsel.

Endorsed: Filed April 22, 1889. Wm. H. Bradley, clerk.

36 Afterwards, to wit, on the twelfth day of July, in the July term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, is the following entry, to wit:

Order.

ROBERT W. WATERMAN
vs.
PHILANDER M. ALDEN *et al.* } In Chancery.

Now come the parties, by their solicitors, and, this cause being set for hearing this day, now comes on to be heard upon pleadings and proofs, and after hearing the arguments of counsel, the court takes the same under advisement.

37 Afterward, to wit, on the twenty-second day of July, 1889, there was filed in said clerk's office the opinion of Chief Justice Fuller in said entitled cause; which said opinion is in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Illinois.

ROBERT W. WATERMAN
vs.
PHILANDER M. ALDEN *et al.*

The Chief Justice was holding the circuit court in the northern district of Illinois pursuant to the written request of Mr. Justice Harlan—R. S. 617.

FULLER, *C. J.*:

James S. Waterman, of Sycamore, De Kalb county, Illinois, made his last will and testament November 28, 1870, in and by which he bequeathed and devised to his wife one-third of all his estate, both real and personal, and the residue (specific legacies, requiring no mention here) to Philander M. Alden and George S. Robinson, who were appointed the executors of the will, in trust for the use of testator's six brothers and sisters (of whom John C. and Robert W. Waterman, both of them then of Illinois, were two) for twenty-one years, the net income and profits annually, and the *corpus* of said residuary estate at the expiration of the time mentioned, to be equally divided between them. The seventh clause of said will was as follows:

"I desire and direct that any and all notes, bills, accounts, agreements, or other evidences of indebtedness against any of my
38 said brothers or sisters held by me at the time of my decease be cancelled by my said executors and delivered up to the maker or makers thereof, without payment of the same or any part thereof, except two notes I hold against John C. Waterman—one for eight thousand dollars, dated August 10, 1870, and due January 1, 1871, and one for four thousand and six hundred dollars, dated November 28, 1870, and due six months after date, and both secured by trust deed upon lands in Johnson county, State of Missouri—which notes I desire and direct to be collected and equally divided between my said brothers and sisters, the child or children of a deceased brother or sister to take the same share the father or mother would have taken if living."

Early in 1881 Robert W. Waterman, then and now residing in California, went into copartnership with one J. L. Porter in the mining business in that State, under the name and style of Waterman & Porter, and James S. Waterman advanced to that firm between twenty-five and thirty thousand dollars, for the development and working of their mines, taking as security the agreement of R. W. Waterman, dated May 14, 1881, to convey at any time within twelve months from that date, upon demand of J. S. Waterman, his heirs, administrators, or assigns, an undivided $\frac{24}{100}$ths of certain mines named in the agreement, the estimated value of the property at that time being, as complainant testified, about $1,000,000.

James S. Waterman died July 19, A. D. 1883, at which time he held the notes of Waterman & Porter for $7,500, dated August 14, 1881, and payable on or before six months; for $1,000, dated October 20, 1881, on four months; for $500, dated November 1,
39 1881, on four months; for $500, dated November 11, 1881, on 90 days, and for $500, dated November 22, 1881, on four months, and also the individual notes of R. W. Waterman for from twelve to fifteen thousand dollars. The will was admitted to probate September 18, 1883, and Alden qualified as executor and surrendered to Robert W. his said individual notes, in compliance with clause seven of the will. Alden's knowledge in respect to these notes was that they came into his possession as executor, while the complainant testifies:

"At the time of my brother's death he did have evidences of indebtedness against me, but there was an unsettled account between my brother and myself which, if fairly settled, would have shown that he was indebted to me at the time of his death."

The executor also surrendered to John C. Waterman his notes for a little over $30,000.

On the 12th of September, 1883, Waterman & Porter remitted to Alden $11,504.51 to take up the notes of Waterman & Porter with interest. In addition to the notes there was upon the books of James S. Waterman an account against Waterman & Porter, beginning in June, 1881, and ending in October of that year, covering various charges, amounting in the aggregate to $389.05, of which one item was for $325, September 20, 1881, for the expenses of

James S. Waterman as a witness to and from San Bernardino, California, and the evidence discloses the pendency of litigation there over the mines at or about that time. The executor claimed also that there was $120 interest due on the Waterman & Porter
40 notes not included in the $11,504.51, and this was subsequently admitted by Waterman & Porter to be correct.

In a letter of Alden, executor, to Waterman and Porter, dated November 20, 1883, after referring to the $120 of interest, he says: "I enclose statement of account due this estate as shown by our books. Mr. R. W. W., I think, understands this matter, and presume that you have something to show that at least a share of this has been paid. If so, please send account duly certified to and it shall have due attention." The result was that items to the amount of $64.05, objected to by Waterman and Porter, were deducted from the $389.05, leaving only the $325. On the 5th day of February, 1884, Waterman and Porter remitted $445, being the $120 interest on their notes, and the $325, and the Waterman & Porter notes were cancelled and returned to that firm in a letter dated February 13th, in which the executor remarks "that that is, he believes, the end of the note question and is all satisfactory."

Complainant was dissatisfied with the terms of the will, in that it tied up the residuary estate for twenty-one years, and he notified Alden on the 8th of September, 1883, that he intended to contest it, but he testified that he did not know on the 12th of September, when the $11,000 draft was forwarded, of the existence of the seventh clause in the will. He says:

"The then estimated value of the property embraced in said agreement was about a million of dollars. This agreement was given as security for the payment to said James S. Waterman for any advances that might be made by him for the development thereof. There was no defeasance clause in writing, and I
41 was fearful that I might have trouble in regard to it if the money was not paid before a demand for a deed, and I had directed my son, James S. Waterman, to pay the notes given to James S. Waterman for advances as fast as possible, on account of serious apprehension that great loss might result from delays, and being at the time in ignorance of clause 7 of James S. Waterman's will."

Complainant wrote to Alden September 23, 1883, that if they had to abide by the will of 1870 he should claim that three-fourths of the amount paid to take up the notes of Waterman & Porter should be repaid to him, and in a letter dated September 27, 1883, he inquires of Alden, "Don't you think I can hold my share of the money paid since brother's death by Waterman & Porter?" To which Alden answered on the 4th of October, 1883, stating that his attorneys advised him that the only obligations, notes, &c., against the brothers which were to be cancelled were simply personal debts, and that debts due from any company or firm of which a brother may have been a member could not be discharged except upon payment in full.

On the 4th day of June, 1886, Waterman filed this bill seeking a decree for the repayment of the $11,504.51 and the $445.

It is admitted that the widow of said James S. renounced the provisions of the will in her behalf; that the estate is solvent and abundantly able to pay all debts, together with costs of administration, without the money so paid by complainant; that the administration of the said estate is still pending and unsettled; that said James S. left no children; that his surviving brothers and sisters were his next of kin and, together with the descendants of a deceased
42 brother and sister, were his only heirs-at-law, and that without complainant's knowledge said James S. assigned and delivered to his wife complainant's agreement to convey the mining property.

The will must be read from the standpoint of the testator, and the material inquiry is, Did the testator intend to release to Waterman & Porter the indebtedness in question or to bequeath it to the complainant, thereby enabling him to charge the firm with the amount? By the terms of the will certain notes of testator's brother John were expressly reserved from its operation as being secured as stated; and when the indebtedness of the firm of Waterman & Porter was incurred it was secured upon the property to develop which the advances were made, including the $325, which appears to have been expended in the same connection. While the testator undoubtedly intended that his brothers and sisters should not be called upon to pay to his estate such moneys as from time to time he had let them have, is that intention to be held to embrace indebtedness arising from loans made in reference to particular enterprises and fully secured, and made not to a brother or sister individually but to a partnership of which a brother was a member? When he charged Waterman & Porter with the $325, expenses to which he was put as a witness, did he intend, by allowing his will, made eleven years before, to remain unrevoked and unchanged, that that item should at his decease be extinguished under the seventh clause? And, apart from that item, did he intend that the specific loans made to the firm of Waterman & Porter to develop this property, worth at the time he took security for those loans one million dollars, should be cancelled under that clause?

43 The notes, bills, accounts, agreements, or other evidences of indebtedness against the brothers and sisters held by testator at the time of his decease were directed to be cancelled by the executors and delivered up to the maker or makers thereof, namely, the brother or sister or brothers or sisters who executed the notes, bills, agreements, or other evidences of indebtedness or contracted indebtedness on account.

But the maker of the notes in question and the party contracting the debt due on account was the firm of Waterman & Porter and not R. W. Waterman, and the mere fact that the latter might be held liable as a member of the firm did not render him the maker of the indebtedness as an individual.

Whether the operation of the seventh clause is to be considered as by way of release or of legacy I cannot under the circumstances,

upon any applicable rule of construction, reach any other conclusion than that it was not the intention of the testator that the indebtedness of Waterman & Porter should be brought within it. The money cannot, therefore, be recovered back and the bill must be dismissed.

Endorsed: Filed July 22, 1889. Wm. H. Bradley, clerk.

44 On the same day, to wit, on the twenty-second day of July, in the July term of said court, 1889, in the record of the proceedings thereof in said entitled cause before Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, is the following entry, to wit:

Decree.

ROBERT W. WATERMAN
vs.
PHILANDER M. ALDEN *et al.* } In Chancery.

The court having considered the matters submitted on the hearing herein finds the issues for the defendants. It is thereupon ordered that the complainant's bill be dismissed for want of equity at the complainant's costs and that execution issue therefor. The complainant, by his solicitor, prays an appeal herefrom to the Supreme Court of the United States, which is allowed upon complainant's filing an appeal bond herein in the penal sum of one thousand dollars within sixty days, with surety to be approved by the court.

45 Afterwards, to wit, on the third day of August, 1889, there was filed in said clerk's office an appeal bond in said entitled cause; which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

UNITED STATES OF AMERICA, *Northern District of Illinois:*

In the United States Circuit Court for said District.

ROBERT W. WATERMAN
vs.
PHILANDER M. ALDEN and GEORGE S. ROBINSON, Individually and as Executors of, &c. } Bill.

On appeal to the Supreme Court of the United States.

Know all men by these presents that we, Robert W. Waterman, of Sacramento, and formerly of San Bernardino, in the State of California, as principal, and William R. Pium, of the county of Du Page, in the State of Illinois, as surety, are held and firmly bound unto Philander M. Alden and George S. Robinson, individually and as executors of the last will and testament of James S. Waterman, deceased, in the penal sum of one thousand dollars lawful money of

the United States; for the payment of which, well and truly to be made, we bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally firmly by these presents.

46 In witness whereof we have hereunto set our hands and seals this — day of August, A. D. 1889.

Whereas in a cause lately depending in the said circuit court of the United States for the northern district of Illinois, on the equity side thereof, in which said Robert W. Waterman was complainant and Philander M. Alden and George S. Robinson, as individuals and as executors of the last will and testament of James S. Waterman, deceased, were defendants, a certain decree was lately rendered by the said circuit court and entered of record on the twenty-second day of July, A. D. 1889, dismissing said bill and cause for want of equity and awarding execution for cost against said complainant for and in behalf of said defendants; and whereas the said complainant has prayed and been allowed an appeal to the Supreme Court of the United States from the said decree of the said circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the said Robert W. Waterman shall duly prosecute his said appeal to effect, and moreover pay the amount of the decree and costs rendered and to be rendered against him, and just damages for delay in case he shall fail to make good his plea, the above obligation to be void; otherwise to remain in full force and virtue.

ROBERT W. WATERMAN, [SEAL.]

47 By WILLIAM R. PLUM,
His Attorney in Fact.

WILLIAM R. PLUM. [SEAL.]

Approved August 3, 1889.
M. W. FULLER, *Ch. Justice.*

(Endorsed:) Filed Aug. 3, 1889. Wm. H. Bradley, clerk.

48 On the same day, to wit, on the third day of August, 1889, there was filed in said clerk's office a certificate of evidence in said entitled cause; which said certificate of evidence is in the words and figures following, to wit:

Certificate of Evidence.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

United States Circuit Court, Northern District of Illinois.

ROBERT W. WATERMAN
vs.
PHILANDER M. ALDEN, GEORGE S. ROBINSON, and Others. } In Equity. Bill.

Be it remembered that on the hearing of the above-entitled cause the complainant gave in evidence as follows: 1st, the deposition of

complainant, filed herein on the 27th day of July, A. D. 1887, and exhibit thereto.

49 ROBERT W. WATERMAN
vs.
P. M. ALDEN *et al.*

Testimony of Robert W. Waterman, taken July 12, 1887, before Elmer E. Rowell, commissioner, at San Bernardino, California.

Q. What is your name, age, business, and place of residence and how long have you resided there?

A. My name is Robert W. Waterman; my age is sixty; my business is ranching and mining; my place of residence is San Bernardino, San Bernardino county, California; I have resided here fourteen years.

Q. Are you the complainant in this suit and do you know the defendants?

A. I am the complainant in this suit and I know the defendants.

Q. Who was James S. Waterman, late of Sycamore, De Kalb county, Illinois? Show his relationship to you.

A. James S. Waterman, late of Sycamore, De Kalb county, Illinois, was my brother.

Q. Have you seen the last will and testament of said James S. Waterman, which was probated in the county court of De Kalb county, Illinois, since his demise? If yea, state when and where you saw it.

A. I have seen what purported to be a copy of the last will and testament of said James S. Waterman, deceased, which was probated in the county court of De Kalb county, Illinois, since his demise. I saw it here in San Bernardino about the 15th of September, 1883.

Q. When did you first see said will or know its contents, and especially when did you know of item or clause seven (7) therein,
50 wherein said James desires and directs that any and all notes, bills, accounts, agreements, or other evidences of indebtedness against any of his brothers or sisters held by him at the time of his decease be cancelled by his executors and delivered up to the maker or makers thereof, without payment of the same or any part thereof, except certain notes of John C. Waterman?

A. I saw what purported to be a copy of said will first on or about the 15th of September, 1883, and I knew of item or clause seven first at that time, wherein said James desires and directs that any and all bills, notes, accounts, agreements, or other evidences of indebtedness against any of his brothers or sisters held by him at the time of his decease be cancelled by his executors and delivered up to the maker or makers thereof, without payment of the same or any part thereof, except certain notes of John C. Waterman. This purported copy of the will was sent to me by my brother, John C. Waterman; before that time I had no knowledge of the contents of the will.

Q. What did you do upon learning for the first time the contents of James S. Waterman's last will and testament?

A. Upon learning for the first time the contents of James S. Waterman's last will and testament I went right to my attorneys in San Bernardino, C. W. C. Rowell and Henry M. Willis, and submitted the said copy to them. I was advised by them that I need not have paid the money, and was not liable therefor. Soon after I wrote to defendant, P. M. Alden, a letter, of which the following is a copy:

"SAN BERNARDINO, CAL., *Sep.* 27, 1883.

"P. M. Alden, Esq.

"DEAR SIR: Yours received. Of course you know why I
51 feel as I do about that will. To think I had a brother who would treat me as an inebriate and spendthrift and a weak-minded man and appoint a trustee to dole out a little money to me is why I kick over. As long as we have to have an executor or trustee I know of no one I had rather have than yourself; and why I wrote you as I did about being appointed myself was because James so expressed himself in his will. I hope to be in Sycamore about the 15th of October. All well. Weather fine. Good bye.

"Yours truly, R. W. WATERMAN.

"Don't you think I can hold my share of the money paid since brother's death? Write me what you think. Judge Willis, my lawyer, says I can."

Q. If witness says in reply to the last question he consulted an attorney, state when and where, and why witness did not then proceed to recover the money already paid for on an account of said estate.

A. Soon after consulting with my said attorneys I corresponded with Mr. Alden, one of the executors of my brother's estate, and received from him a letter, of which the following is a copy:

"Estate of James S. Waterman.

"SYCAMORE, ILLS., *Oct.* 4, 1883.

"Yours of the 27th ult. received and noted, and will say briefly that the attorneys here say that under the law the only obligations, notes, and so forth, against the brothers of the deceased which are to be cancelled must be simply personal debts. Therefore debts due from any company or firm of which a brother may have been a member cannot be discharged except upon payment in
52 full. Expecting to meet you in a short time when we can talk matters over more freely, I remain,

"Yours truly, P. M. ALDEN."

I went on to Sycamore, Illinois, in October, 1883, and there had a long conversation with Mr. Alden with reference to the subject-matter of this suit, where again he assured me that I was holden for the amount; that he had counseled with learned attorneys, and all decided that I was holden for the amount. Mr. Alden seemed desirous of repaying to me the amount that I had paid, and said that he would be glad to do so if the laws of Illinois would permit.

The conversation I had with Mr. Alden and the advices he had given me and the advices that his attorneys had also given him gave rise to some hesitancy in the matter, which, of course, necessitated a long and careful investigation of the matter before I could proceed.

Q. Did you know the laws of Illinois touching your liability to pay the notes and accounts against Waterman & Porter held by James S. Waterman at the time of his death when such payments were made, having reference to said clause or item seven?

A. I did not know the laws of Illinois touching my liability to pay the notes and accounts against Waterman & Porter held by J. S. Waterman at the time of his death when such payments were made, having reference to said clause or item seven.

Q. If witness at any time wrote said Alden about a repayment of moneys sent him on account of said estate, state definitely what such payment was and attach any answer witness may have received.

53 A. I only wrote to Mr. Alden about the payments I had made to my brother's estate after his death, and being about twelve thousand dollars. I have no answer to that letter.

Q. When, if at all, were you first advised as to the laws of Illinois as to your liability and the liability of Waterman & Porter or either, having reference to said clause or item seven of said will, to pay the notes and accounts described in your bill in this cause, and by whom were you advised, and what was its substance?

A. I was first advised as to the laws of Illinois with reference to my liability and the liability of Waterman & Porter or either, having reference to said clause or item seven of said will, to pay the notes and accounts described in my bill in this cause in Mr. Alden's letter of October 4th, 1883, in answer to mine of September 27th, same year. I was advised by Mr. Alden and, in substance, as stated in his letter.

Q. Give the dates of payment and the amounts thereof made and to whom made on account of the said estate since James' death, and state what such payments were made for; also state who sent the same and who directed the funds to be sent.

A. The first payment was made September 12th, 1883, and amounted to $11,004.51; the second payment was made February 8th, 1884, and amounted to $445, each amount being paid to defendant, P. M. Alden, executor of the estate of James S. Waterman, deceased, the first item being for borrowed money, and the second item on account of merchandise furnished and advances made by J. S. Waterman. I had given my son, who was our general

54 book-keeper and secretary, general directions that whenever there was a surplus of the bank account over and above the running expenses of the mill to send the same on to my brother, J. S. Waterman, but I did not give him any specific directions in regard to these particular payments.

Q. When did you and J. L. Porter first enter into the mining business as partners, and how long did such relation continue? In your agreement what proportion of the expenses of the firm were to be

borne by yourself? What proportion of said monies for which said drafts were drawn, if any, was your own money?

A. J. L. Porter and I went into copartnership in the early part of 1881, and have continued as such ever since. Three-quarters of the expenses of the firm were to be borne by me and one-quarter by Mr. Porter. Three-quarters of the money for which drafts were drawn was mine.

Q. Did J. L. Porter know of the sending of either of said drafts at or before the times they were sent, respectively?

A. I don't know.

Q. Did J. L. Porter know anything of clause seven of said will at any time before said payments were made?

A. He did not.

Q. When did you first learn of your brother James' death?

A. On the 25th day of July, 1883, I first learned of my brother's death.

Q. Do you know of any other reason for the payment of said notes and accounts? If so, state the same fully and at large.

A. I have made an agreement with my brother as security for the payment of any advances which he might make to me and Mr. Porter for the working of the mine on May 14, 1881, of which the following is a copy:

55 "SAN BERNARDINO, *May* 14, 1881.

"For and in consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I hereby agree that at any time within twelve months from this date upon demand of J. S. Waterman or his heirs, administrators, or assigns I will execute to him a good and sufficient deed of conveyance to an undivided twenty-four one-hundredths ($\frac{24}{100}$) of the following mines, known as the Alpha, Omega, Silver Glance, and Front, each being six hundred feet wide by fifteen hundred feet long, and the same interest in all lands that may be located or has been located for the development of the above mines, with such machinery and improvements as is to be placed upon the same, all subject to the same proportion of expenses which is to be paid out of development of the above property, all situated near the Grapevine, in the county of San Bernardino, State of California.

"(Signed) R. W. WATERMAN."

The then estimated value of the property embraced in said agreement was about a million of dollars. This agreement was given as security for the payment to said James S. Waterman for any advances that might be made by him for the development thereof. There was no defeasance clause in writing, and I was fearful that I might have trouble in regard to it if the money was not paid before a demand for a deed, and I had instructed my son, James S. Waterman, to pay the notes given to James S. Waterman for advances as fast as possible, on account of serious apprehensions that great loss might result from delays, and being at the time in ignorance of clause seven of James S. Waterman's will.

56 Q. Do you know any other matter or thing touching the matters in controversy in this cause that may tend to the advantage of yourself, in addition to what you have already stated? If yea, state the same as fully and at large as if you had been particularly interrogated in reference thereto.

A. I know of nothing further that I can state in answer to the matter.

ROBERT W. WATERMAN.

57 *Cross-Interrogatories to be Propounded to Robert W. Waterman.*

X Int. 1. When did you first see Philander M. Alden or George S. Robinson after the death of Jas. S. Waterman, deceased?

Ans. I saw them both in the last of October, 1883.

X Q. Did you receive any letter or letters from said Alden or Robinson after the death of Jas. S. Waterman and prior to the payments you made to them as executors of your brother, Jas. S. Waterman? If so, attach any and all such letters so received from them or either of them to your deposition and mark them as exhibits thereto.

Ans. I had in my possession a letter from Mr. Alden of date October 4th, 1883, a copy of which is set forth in answer to the second interrogatory, but it has been mislaid and I cannot find it.

X Q. Did you receive any letter or letters from any person after the death of your brother, James S. Waterman, and prior to the making of any payment of money to his executors, stating any of the provisions or contents of his will? If so, attach any and all such letters to your deposition *and* exhibits thereto.

Ans. I received no letter from any one subsequent to my brother's death stating any of the provisions or contents of the will prior to the payment of any money to the executors.

X Q. If the agreement between you and J. L. Porter in relation to your partnership or any part thereof was in writing, please attach a copy of such agreement or agreements to your deposition as exhibits thereto.

Ans. There was an agreement in writing between Mr.
58 Porter and myself in relation to our partnership, a copy of which is hereto attached and marked "Exhibit A."

X Q. State how the draft or drafts sent by Waterman & Porter to the executors of Jas. S. Waterman were paid for; whether in currency, coin, or by check; and, if by check or checks, attach such check or checks or copies thereof to your deposition as exhibits. If paid for in coin or currency state whether such coin or currency did not belong to the firm of Waterman & Porter.

Ans. The money was paid from deposits made with the Bank of California. I have not the original drafts, but the following is a copy of the check sent to the bank:

"SAN FRANCISCO, *September* 12, 1883.

"The Bank of California

"Pay to the Bank of California or bearer eleven thousand five hundred and sixteen ($11,516.00) dollars.

"WATERMAN & PORTER,
"Per J. S. W."

This money belonged to the firm of Waterman & Porter. At the time this check was drawn my son, J. S. Waterman, was at the mill at Waterman, seventy-five miles from San Bernardino, and I was not with him at the time the check was drawn.

X Q. State whether any entry or entries were made upon the books of Waterman & Porter in relation to the payment of any sum or sums of money to the executors of Jas. S. Waterman, deceased, and if any such entry or entries were made attach copies of
59 all such entries to your deposition as exhibits thereto.

Ans. The entries were made, but the books are not now in my possession, and I cannot attach copies of the entries.

X Q. State whether or not the draft or drafts sent to the executors of Jas. S. Waterman in payment of the indebtedness due from the firm of Waterman & Porter were not purchased on behalf of the firm or with firm funds, and whether the firm were not charged with the money used in purchasing said drafts.

Ans. The drafts were purchased on behalf of the firm funds, and the firm was charged with the money used in the purchase of said drafts.

X Q. State whether J. L. Porter has not contributed his share towards the payment of the indebtedness due from the firm to Jas. S. Waterman at the time of his death, or, if he has not so contributed, whether he is not charged with his share thereof on the books of the company.

Ans. J. L. Porter has contributed his share towards the payment of the indebtedness due from the firm to James S. Waterman at the time of his death.

X Q. State whether you individually was indebted to your brother, James S. Waterman, at the date of his death; and, if so, state to what amount, upon what account, whether evidences of such indebtedness were held by your brother at the time of his death, and whether ever paid, or was asked to pay anything to your brother's executors after his death by reason of such individual indebtedness, and what has become of the evidences of such individual indebtedness held by your brother at the day of his death.

Ans. At the time of my brother's death he did have evi-
60 dences of indebtedness against me, but there was an unsettled account between my brother and myself which, if fairly setttled, would have shown that he was indebted to me at the time of his death. I do not know what has become of the evidences of my individual indebtedness held by my brother at the time of his death.

(Endorsed:) Filed July 27, 1887. Opened Sept. 2, 1887. For def'ts' att'y. Wm. H. Bradley, clerk.

61 2d. The following exhibits and stipulation filed herein July 12, 1889, to wit: Letter of P. M. Alden, ex'r, to Mess. Waterman & Porter, Waterman, Cal., dated Nov. 20, 1883; statement of account showing balance $389.05; letter of said Alden, ex'r, to said Waterman & Porter, dated Feb'y 13, 1884, and the stipulation.

62 *Stipulation and Evidence.*

Jas. S. Waterman died July 19, 1883. P. M. Alden and Geo. S. Robinson, executors of last will and testament.

Estate of James S. Waterman.

OFFICE OF EXECUTORS, SYCAMORE, ILL.,
Nov. 20, 1883.

Messrs. Waterman & Porter, Waterman, Cal.

GENTS: Referring again to your letter of Sept. 12, '83, and the question of your having overpaid interest on two certain notes to am't of $120.00, I find upon examination that the notes in question should have drawn interest from date, as is fully shown by Mr. Waterman's books as well as by the books of our bank (record of drafts, &c.,) —*i. e.*, the notes were not discounted, and the full face of each ($2,000 & $1,000) was remitted to you by draft on N. Y. The error occurred simply by Mr. W.'s using some of the bank notes (instead of his own), which are printed to draw int. after maturity, whereas his blanks read with int. from date, and he overlooked the matter of making the necessary change; hence must ask you to remit the bal. due ($120), & upon rec't of same will be ready to cancel and return notes still in our hands. I enclose "statement of acc't"
63 due this estate as shown by our books. Mr. R. W. W., I think, understands this matter, and presume that you have something to show that at least a share of this has been paid. If so, please send acc. duly certified to, as it shall have due attention.

Yours very truly, P. M. ALDEN, *Ex'r.*

64 SYCAMORE, ILL., *Nov.* 20, 1886.

Messrs. Waterman & Porter to estate of J. S. Waterman, deceased.

June —, '81.	Cash for paper	2 00
	Suit of clothes "R. W. W."	25 00
	Express ch'g's	1 65
	Goods to Snoderly	11 90
Sept. 20, '81.	Expenses (J. S. W.) as witness to and from San Bernardino	325 00
	Paper	1 00
Oct. —, '82.	1 coat "Cal. case"	22 50
	Bal. due on acc.	389 05

65 Jas. S. Waterman died July 19, 1883. P. M. Alden and Geo. S. Robinson, executors of last will and testament.

Estate of James S. Waterman.

OFFICE OF EXECUTORS, SYCAMORE, ILL., *Feb'y* 13, 1884.

Messrs. Waterman & Porter, Waterman, Cal.

GENTLEMEN: Your favor of the 5 inst. duly rec'd, and by same mail (this a. m.) I have received from the Bank of Cal. d'ft 445.

Bal. in'st on note	$120 00
On acc't (as stated)	325 00
	445

Will try to have balance of acc. ($64.05) cr'd back to you, as I have not the least doubt but that your explanation of the matter is entirely correct.

I enclose herewith (duly canceled) old notes as follows, $2,500 & 2,000 paid in June, '83; $75.00, 1,000, 500, & 500 paid in Sept., '83, which is, I believe, the end of the note question and is all satisfactory; also your (J. S. W.) personal explanation. Of course, in the handling of a large estate like this we are compelled to be pretty strict in our business matters.

With kind regards to all friends, I remain

Yours truly, P. M. ALDEN, *Ex'r.*

66 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

U. S. Circuit Court for Northern Dist. of Ills. Chancery.

ROBERT W. WATERMAN *vs.* P. M. ALDEN *et als.* } Bill.

It is hereby stipulated and agreed that the letter and statement hereto attached, dated Nov. 20, 1883, and letter also attached, dated Feb'y 13, 1884, are in the handwriting of P. M. Alden, and were mailed to Waterman & Porter, Waterman, Cal., on or about their respectives dates, by said Alden, and that the same may be affixed in evidence in said cause without further proof, reserving objections to competency & materiality.

WILSON & MOORE,
Solicitors for Defendants.

Chicago, June 15, 1888.

(Endorsed:) Filed July 12, 1889. Wm. H. Bradley, clerk.

67 *Stipulation of Counsel. Filed Herein July* 12, 1889.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

United States Circuit Court, Northern District of Illinois.

ROBERT W. WATERMAN
vs.
PHILANDER M. ALDEN *et als.* } Bill.

It is stipulated and agreed that for all purposes of this cause it is admitted that testator, James S. Waterman, was engaged in the banking business in Sycamore, Ills., for about twenty years prior to his death, and for several years preceding his demise was president of a national bank there; that he left no children or descendants; that his surviving brothers and sisters were his next of kin and, together with descendants of a deceased brother and sister, were his only heirs-at-law, and that without complainant's knowledge said James, in his lifetime, assigned and delivered unto Abbie L. Waterman the certain instrument, a copy of which is in evidence, dated May 14, 1881, and signed R. W. Waterman.

WILSON & MOORE,
Solicitors for Defendants.
W. R. PLUM,
Comp'ts Sol'r.

(Endorsed:) Filed July 12, 1889. Wm. H. Bradley, clerk.

68 4. Section 1659 of an act entitled "An act to establish a Civil Code," approved March 21, 1872, and shown on page 308 of volume 2 of Deering's Annotated Statutes of California, as follows:

"Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several."

And thereupon, the defendants gave in evidence, on their behalf, as follows:

1. Deposition of P. M. Alden, filed herein May 28th, 1888, and exhibits attached thereto.

69 ROBERT W. WATERMAN
vs.
PHILANDER M. ALDEN and GEORGE S. ROBINSON, as Executors of the last Will and Testament of James S. Waterman, Deceased. } Bill.

It is stipulated between the parties to the above-entitled cause that the deposition of Philander M. Alden, taken on the 25th day of April, A. D. 1888, in the above-entitled cause, may be read in evidence upon the hearing of said cause the same as though due notice of the time and place of the taking of said deposition had been given.

Be it remembered that on this 25th day of April, A. D. 1888, personally appeared before me, Allen Boyer, a notary public in and for the county of Cook and State of Illinois, Philander M. Alden to testify on the part of the defendants in the above-entitled cause.

Present: J. P. Wilson, Esq., solicitor for defendants; W. R. Plum, Esq., solicitor for complainant.

70 PHILANDER M. ALDEN, a witness called on behalf of the defendants, having been first duly sworn, was examined in chief by Mr. WILSON, and testified as follows:

Q. What is your name, age, occupation, and place of residence?

A. My name is Philander M. Alden; 53 years old, and am one of the executors and trustees of the estate of James S. Waterman; I reside at Sycamore, in this State.

Q. You are one of the defendants to the bill brought by Robert W. Waterman, are you not?

A. I am.

Q. Are you acquainted with Robert W. Waterman?

A. I am, and have been for twenty years.

Q. Were you acquainted with James S. Waterman in his lifetime?

A. I was.

Q. Do you remember at what date the will of James S. Waterman was filed in the county court of De Kalb county?

A. It was filed on or about the 25th day of July, 1883.

Q. Did you have any correspondence with Robert W. Waterman, the complainant, during August and September?

A. I did.

Q. Have you in your possession any letters received from him during those months or written during those months and received by you?

A. I have.

Q. Will you produce the same and make them exhibits to your deposition?

A. I will. (Witness produces letters.) The letters produced by me and marked Exhibits A, B, C, and D, respectively, are letters written by Robert W. Waterman, the complainant, and were received by me in due course of mail after the dates which they bear respect-
71 ively, and I attach them to and make them part of my deposition.

Objected to because complainant's attention was not called to any of these letters when he was examined, and as to the letter of September 12, 1883, it does not appear that the complainant ever saw it.

Q. Have you in your possession now any other letters received from the complainant during the period covered by the letters offered in evidence?

A. I must have, but they are mislaid. One letter in particular I remember, and, I think, two or three letters which I have been unable, after pretty careful search, to find.

Q. Look at the letter dated September 12th, marked "Exhibit B," and state whether any enclosure was received in that letter.

A. There was a draft on Chicago for $11,504.51.

Q. Was that draft paid?

A. That was paid soon after its receipt.

Q. Was that the only draft received in payment of the notes of Waterman & Porter after the death of James S. Waterman?

A. No, sir; there was $120 additional on these same notes on account of interest, which was not paid until it was received on the 13th day of February following—February, 1884.

Q. Under the signature to this letter of Waterman & Porter are the words "per J. S. W." Do you know who J. S. W. was, who signed those initials?

A. He is a son of Robert W. Waterman, the complainant, and a nephew of the deceased, James S.

Q. Will you attach a certified copy of the will of James S. Waterman to your deposition and mark it "Exhibit E?"

A. I will.

72 Q. Do you remember the date when the will of James S. Waterman was admitted to probate?

A. It was on the 18th of September, 1883, to the best of my recollection.

Q. Had you, prior to the receipt of the draft, in the letter dated September 12th, offered in evidence, asked for the payment of any of the notes of Waterman & Porter?

A. No, sir.

Q. Mr. Alden, do you remember receiving a payment on or about February 8th, 1884, amounting to $445?

A. Yes, sir; I think it was received by me on the 13th.

Q. Can you state what items made up that amount?

A. First, $120, balance of interest due on notes paid, as stated in the letter of September 12, 1883; the other item was for expenses incurred by Mr. J. S. Waterman, as a witness, to and from San Bernardino, amounting to $325, the two together making $445, which was received by me, I believe, on the 13th of February, 1884.

Q. Were those items a charge against Robert W. Waterman individually or the firm of Waterman & Porter?

A. Against Waterman & Porter.

Q. Was there any indebtedness due from the complainant, Robert W. Waterman, individually, to James S. Waterman at the time of James S. Waterman's death?

A. Yes, sir; there was.

Q. What, if anything, has been done in regard to such indebtedness, and what was the amount of such indebtedness?

A. The indebtedness was evidenced by certain promissory notes, which have been surrendered under terms of the will. The amount I cannot state positively, but I should say twelve to fifteen

73 thousand dollars. The books will show.

Q. It is charged in the bill in this case that you wrongfully and in bad faith neglected to advise the complainant of the seventh clause of the will of James S. Waterman, and in that way induced

him to pay the firm notes of Waterman & Porter. Now, what is the fact in that regard?

A. Well, I deny, in the first place, positively, having done anything of the kind. In the month of August, in conversation with a brother of complainant, Mr. John C. Waterman, he told me he was corresponding with Robert and had given him a copy of the will; that Robert was dissatisfied generally with the will, and would probably object to its being finally probated.

All conversations with John C. Waterman are objected to as incompetent and immaterial, and for the further reason that John C. Waterman is dead.

Q. At the time you received the letter dated September 12th, enclosing draft, did you know or suppose that the complainant, Robert W. Waterman, was in ignorance of the seventh clause of the will of James S. Waterman, deceased?

Objected to.

A. I understood from a letter which is dated the same as Exhibit A and from other correspondence, one letter received on same day, that the substance of those letters showed conclusively that he was conversant of all conditions of the will in question.

Counsel for complainant objects to any suppositions or inferences from letters not produced or from letters produced.

Q. You refer to the letter of the 8th, not offered in evidence?

A. I do.

74 Q. What search, if any, have you made for that letter?

A. I have already stated that I have looked carefully for the letter and have been unable to find it. I am quite sure it is in existence, but I have been unable from the search that I have made to find it.

Cross-examination by Mr. PLUM:

Q. Do you remember my coming to you at Sycamore, March 5th, 1886, and making a demand in behalf of the complainant for repayment of these monies?

A. Yes, sir; on March 5th, 1886, you were at my office for that purpose.

Q. Didn't you tell me that time that you had no knowledge whatever or any reason to believe that Robert Waterman knew of clause seven of James S. Waterman's will at the time of making the first payment?

A. No.

Q. At that time you was on friendly terms with Robert W. Waterman, was you not?

A. I so considered it, certainly.

Q. And since then he has been the principal complainant in a suit brought against you for your removal, has he not, as trustee under the will?

A. I am so informed. He has continued to write friendly letters, however.

Solicitor for complainant moves to strike out the latter part of the answer as not responsive.

75 Q. Before March 5th, 1886, you had written Robert W. Waterman that you would afford me every facility in your power to get at the facts in relation to this matter in this suit, had you not?

A. I had.

Q. And when I was out in Sycamore, on March 5th, 1886, you purported to show me originals and letter-press copies of all the correspondence you had with Robert W. Waterman prior to the last payment made by him or Waterman & Porter, did you not?

A. I did; yes, sir.

Q. You kept a letter-press copy book at that time of letters written by you, did you not?

A. No, sir; the book was not commenced until, I think, about the first of October, 1883.

Q. But you kept letter-press copies in some other book, did you not?

A. I may have kept some of my own letters, but none of the estate letters that I remember of; none to Robert, the complainant.

Q. Examine that paper and state if it is a copy of a letter written to Robert Waterman by you.

Mr. WILSON: I object to that unless the original is produced or accounted for.

Mr. PLUM: It is his signature—his own writing.

The WITNESS: Yes; that is a correct copy.

Q. That copy is in your handwriting, isn't it?

A. No, sir.

Q. The red ink?

A. The red-ink endorsement, "copy," is mine.

Q. How did you come by that copy?

A. I took it from a letter book.

Q. From a letter-press copy of a letter which you sent to Mr. Waterman?

A. Yes, sir. As I stated before, that is about the time the book was commenced.

76 Q. You made it out and sent it to me, did you not?

A. I think so; at your request, I believe.

Q. Examine the papers marked Exhibits F and G, respectively, and state in general terms what they are.

A. Exhibit F was received by me from you at Sycamore, March 5th, 1886, and Exhibit G is the reply which I delivered at the same date to you.

Q. Examine the paper marked Exhibit H and state in whose handwriting that is.

A. It is in my handwriting.

Q. What was done with that by you?

A. That was mailed to Mr. Robert Waterman at Waterman, California, on or about the date shown.

Q. Examine the letter dated September 18, 1883, marked Exhibit 1, addressed to R. W. Waterman, Esq., and state in whose handwriting that is.

A. It is in my handwriting.

Q. Did you send that to Mr. Waterman?

A. Yes, sir; I mailed that to Mr. Waterman at San Bernardino, California.

Q. Please examine Exhibit J and state what it is.

A. It is the draft I have referred to for $11,504.51 on the Union National Bank of Chicago.

Q. Examine Exhibit K and state if it is in your handwriting and if you sent it to the parties addressed.

A. It is in my handwriting, dated September 18, 1883, and was directed as appears.

Solicitor for complainant offers in evidence papers marked respectively Exhibits E, F, G, H, I, J, and K.

Q. You may state whether or not the estate of James S. Waterman was at the time of filing this bill and is solvent and amply and abundantly able to pay all debts, cost of administration,
77 and other charges or claims, including the legacies, general or special, contemplated or provided for in said will, without the payments which you have testified to here to-day.

A. It is, to the best of my belief.

Q. All you know about the indebtedness you have spoken of, aside from the collections made by you from Robert to James Waterman, is the fact that certain notes of Robert came to your possession as executor, is it not?

A. That is substantially all I know.

(Mr. PLUM:)

Int. When did John C. Waterman die?

Ans. He died on the 19th of October, 1883.

Int. He was a brother of James S., was he not?

Ans. Yes, sir.

Int. How much was he owing James S. Waterman at the time of the death of the latter?

Ans. I cannot give the exact amount, but about $30,000; I think a little more than $30,000.00.

Int. That was in notes mainly, was it not?

Ans. I believe entirely in notes.

Int. What was done with those notes?

Ans. They were surrendered.

Int. Under the terms of the will?

Ans. Under the terms of the will; same as the others.

Int. Examine this paper marked "Exhibit L" and state what it is in general terms.

Ans. Well, it is a letter written by myself on July 21st, 1887,

directed to the Honorable Robert W. Waterman, San Bernardino, California.

Int. You mailed that to him, did you?

Ans. Yes, sir; I did.

Int. Did you ever receive any reply to it?

Ans. I cannot state positively, but I think I received a brief reply.

78 Int. If you ever received any letters from Robert W. Waterman after the date of that one of a friendly character, will you attach the same to your deposition?

Ans. I will.

(Mr. PLUM:) I offer that letter in evidence.

PHILANDER M. ALDEN.

Subscribed and sworn to before me this 24th day of May, 1888.

ALLEN BOYER,
Notary Public.

79 Ex. A. Allen Boyer, N. P.

SAN BERNARDINO, CAL., *Sept.* 8, '83.

P. M. Alden, Esq., ex., &c., of estate of J. S. Waterman, deceased.

SIR: I hereby notify you, as one of the ex. of the above estate, that I shall contest said will, as it was the desire of Mr. J. S. Waterman that said will should be destroyed. I thereupon protest against its being admitted to probate.

ROBERT W. WATERMAN.

(Endorsed on back:) Filed Sep. 17, 1883. C. M. Conrad, clerk.

Ex. B. Allen Boyer, N. P.

SAN FRANCISCO, *Sep.* 12*th*, 1883.

Mr. P. M. Alden, Sycamore, Ill.

D'R SIR: Enclosed please find c'k on Chicago for $11,504.51 for our notes held by estate of Mr. J. S. Waterman, Aug. 14, '81, $7,500.00; Oct. 20, '81, 1,000.00; Nov. 7th, '81, 500.00; Nov. 11th, '81, 500.00; Nov. 22, '81, 500.00, with in'st at 8% per annum, less $120.00, which was overpaid interest on two of the notes which were taken up in May. They were for $2,000.00 and $1,000.00, with interest to commence six months after date, whereas we sent full interest from date. The other notes all read interest from date. These include, I believe, all of the notes. We would have taken them up before, only the bank has been a little slow about selling our bullion. If there should be any errors in figuring the interest,

80 we would be happy to correct them. Please send these notes, together with the ones paid in June, which you omitted to return to us at Waterman, Cal., and greatly oblige,

Yours very truly, WATERMAN & PORTER,
Per J. S. W.

Ex. C. Allen Boyer, N. P.

SAN BERNARDINO, CAL., *Sep.* 23*rd*, 1883.

P. M. Alden, Esq.

MY DEAR SIR: All the notes due my bro. from Waterman & Porter are paid; yet, by the will of my bro., I need not have paid my part—"¼." Therefore I shall claim that, to be repaid to me on all of our notes paid since my bro.'s death—that is, if we have to abide by the will of 1870. I hope to be with you in Oct., and if Judge Robinson does not qualify as one of the ex. I claim the place, as my bro. expresses himself that I should do so.

Yours truly, R. W. WATERMAN.

Ex. D. Allen Boyer, N. P.

10 | 4. Copy.

SAN BERNARDINO, CAL., *Sep.* 27, '83.

P. W. Alden, Esq.

D'R SIR: Yours rec'd. Of course you know why I feel as I do about that will. To think I had a brother who would treat me as an inebriate—a spendthrift, a weak-minded man—and
81 appoint a trustee to dole out the little money to me is why I kick over. As long as we have to have an ex. or trustee, I know of no one I had rather have than yourself, and why I wrote you as I did about being appointed myself was because James so expressed himself in his will. I hope to be in Sycamore about 15th Oct. All well. Weather fine. Good bye.

Yours truly, R. W. WATERMAN.

Don't you think I can hold my share of the money, ¼, p'd since brother's death by Waterman & Porter? Write me what you think. Judge Willis, my lawyer, says I can.

Ex. E. Allen Boyer, N. P.

Copy.

Estate of Jas. S. Waterman.

SYCAMORE, ILL., *Oct.* 4, 1883.

R. W. Waterman, Esq., San Bernardino, Cal.

DEAR SIR: Yours of 27th ult. rec'd and noted and will say briefly that the att'ys here say that under the will the only obligations (notes, &c.) against the brothers of the deceased which are to be cancelled must be simply personal debts; therefore debts due from any Co. or firm of which a brother may have been a member cannot be discharged except upon payment in full. Expecting to meet you in a short time when we can talk matters over more freely, I remain

Yours very truly, P. M. ALDEN, *Ex'r.*

82 Ex. F. Allen Boyer, N. P.

SYCAMORE, ILLS., *March* 5, 1886.

To Philander M. Alden and George S. Robinson, as individuals and as executors of the will of James S. Waterman, late of Sycamore, deceased:

You are hereby notified that in and by a certain clause in the last will aforesaid of said James S. Waterman he; the said decedent, as stated therein, desired and directed that all notes, accounts, agreements, or other evidence of indebtedness against any of his brothers or sisters held by him, said James S. Waterman, at the time of his death be cancelled by you as his executors aforesaid and delivered up to the maker or makers thereof without payment of the same or any part thereof, except certain notes of John C. Waterman described; that at the time of the death of said James S. Waterman he held certain notes against his brother, Robert W. Waterman, of San Bernardino county, California, signed by the firm name of Waterman & Porter, said firm being composed of said Robert W. Waterman and J. L. Porter; that one of said notes was dated August fourteenth, 1881; another, October 20, 1881; another, November 1, 1881; another, November 11, 1881, and another, November 22, 1881; that the first was for the sum of seven thousand and five hundred dollars, the second for one thousand dollars, and the last three for five hundred dollars each, all payable to the order of said J. S. Waterman, with interest at the rate of eight per cent. per annum, on which several notes you claimed interest aggregating the sum of
83 one thousand five hundred and four $\frac{51}{100}$ dollars; that also at the time of his death aforesaid said James S. Waterman held certain accounts against said Robert W. Waterman aggregating three hundred and twenty-five dollars and certain interest claims on other notes aggregating one hundred and twenty dollars, both of which were claimed to be owing by said firm of Waterman & Porter.

And you are further notified that all of said notes and accounts were "notes, bills, accounts, agreements, or other evidences of indebtedness against" Robert W. Waterman, one of the brothers of said testator, held by him at the time of his decease within the true intent and meaning of said will, and it was your duty as executors thereof to have cancelled and delivered up the same to the maker or makers thereof without payment of the same or any part thereof.

And you are further notified that on or about the twelfth day of September, A. D. 1883, without notice or knowledge of the said provisions in said will or of the gift of said evidences of indebtedness or of any of the provisions of said will relating thereto, the said Robert W. Waterman caused to be sent to you, the said Philander M. Alden, the sum of eleven thousand five hundred and four $\frac{51}{100}$ dollars in payment of said first five notes and interest thereon; that said sum was paid to said Alden on account of the estate of said James S. Waterman after his demise, and has been inventoried or reported by you as executors aforesaid; and you are further notified

that subsequently said Robert W. Waterman caused the payment of said sums of three hundred and twenty-five dollars and one hundred and twenty dollars to you, the said executors; that the
84 said Robert W. Waterman furnished at least three-fourths of each of said several payments and owned at least three-fourths interest in the business of said firm of Waterman & Porter; that the intention of said testator was to make a gift of said notes, accounts, and interest absolutely to said Robert W. Waterman; wherefore, by virtue of authority in me vested, which I herewith exhibit, I hereby demand of you the repayment of said several sums to me for and in behalf of Robert W. Waterman aforesaid, my principal; and in case you have doubts as to your liability to pay more than three-fourths of said sum of $11,504.51 you are further notified that I will now receive the said three-fourths, being $8,628.38¼, and give you full credit therefor, and allow you a reasonable time, if desired, to investigate as to your liability for the balance; otherwise I shall commence suit in behalf of said Robert W. Waterman without unnecessary delay.

WILLIAM R. PLUM,
For and as Attorney-in-Fact of Robert W. Waterman.

85 Ex. G. Allen Boyer, N. P.

Jas. S. Waterman died July 19, 1883. P. M. Alden and Geo. S. Robinson, executors of last will and testament.

Estate of James S. Waterman.

OFFICE OF EXECUTORS, SYCAMORE, ILL., *M'ch* 5, 1886.

Mr. Rob't W. Waterman, represented by W. R. Plum, Esq., his att'y-in-fact:

Concerning your demand of this date, I would say that the executors of the estate of Jas. S. Waterman decline to comply therewith or any part thereof, for the reason that they are advised that the monies in said demand mentioned of right belong to the said estate of Jas. S. Waterman, deceased.

P. M. ALDEN,
Ex'r of said Estate.

Individually I must decline, for the reason that said monies were rec'd for and have been accounted in the proper court to the credit of the said estate of J. S. Waterman, dec'd.

P. M. ALDEN.

86 Ex. H. Allen Boyer, N. P.

J. S. Waterman, president. 1896. P. M. Alden, cashier.

SYCAMORE NATIONAL BANK,
SYCAMORE, ILL., *July 26th*, 1883.

R. W. Waterman, Esq., Waterman, Cal.

MY D'R SIR: You have of course ere this heard all the details of

the last days and death of your bro. James and my true friend; hence I write this hasty note to make an inquiry or two in relation to his matters and to ask you to express freely any wishes you may have in relation to same. You are, I suppose, aware of the will made by Mr. W. some years since (a will drawn up some two or three weeks before his death, never having been executed); that my name (with Judge G. S. Robinson) was used as an executor; that later Mr. W. put your name in place of Robinson's, but failed to have a witness to this change, so that R. is still in point of law one of the ex'rs, but under all circumstances I do not think that he would or will serve; have written him for an immediate answer. I do not know that I can act, but some of the friends say that owing to my knowledge of Mr. W.'s matters I must do it. What think you, and if I act who shall the other man be?

Also, in relation to Mr. Waterman's interest in the mine there, I find no evidence here of title to Mr. W. There is a report that the mine belonged to Mrs. W. How is it?

Your brief and early response, with any suggestion which you have to make, will oblige

Yours very truly, P. M. ALDEN.

87 Ex. I. Allen Boyer, N. P.

Office of J. S. Waterman estate.

SYCAMORE, ILL., *Sept.* 18*th*, 1883.

R. W. Waterman, Esq., San Bernardino, Cal.

MY DEAR SIR: Yours of 8th inst. rec'd and duly noted, and I must say that I am in an unfortunate position. I would be very glad to listen to your request and defer action in the matter of probating the will, but the heirs here will not consent to any further delay whatever. I have consulted Judge Kellum and other good att'ys, and they all say that there is no good reason for delay; that anything that your bro. James said to you about having the will now in question destroyed, &c., does not cut any figure under our statutes; that whatever you or others might decide to do towards having the will annulled would have to be done in a court of chancery, and could be done just as well after the will has been admitted to probate as before; hence I suppose that we must proceed at once under conditions of the will and the law governing such cases.

I am very strongly inclined to decline having anything to do with the settlement of the estate whatever, and may take that course. I cannot afford to go into anything of the kind unless there is harmony of action on all sides.

When I see you I can of course explain more fully and shall be very glad to do so and to consult with you fully on all questions.

Yours very truly, P. M. ALDEN, *Ex'r.*

88 Ex. J. Allen Boyer, N. P.

Countersigned: J. P. Allen, Exchange clerk.

$11,504.51.

SAN FRANCISCO, *Sept.* 12, 1883.

On demand of this first of exchange (second and third unpaid), pay to the order of P. M. Alden, ac. estate J. S. Waterman, eleven thousand five hundred four $\frac{51}{100}$ dollars, for value received, which charge to account with or without advice.

WILLIAM ALVORD, *President.*

To Union National Bank, Chicago.

[1.] No. 5546.

UNION NAT'L BANK, Paid Sept. 19, 1883 CHICAGO, ILL.

Endorsed on back: P. M. Alden, for estate of J. S. Waterman. Pay Merchants' National Bank of Chicago or order for collection acc't of Sycamore National Bank, Sycamore, Ill. P. M. Alden, cashier.

Paid through Chicago clearing-house, Sep. 19, 1883, to the Merchants' Nat'l Bank.

89 Ex. K. Allen Boyer, N. P.

Postal card.

Stamp.

SYCAMORE, SEP. 18 ILL.

Nothing but the address can be placed on this side.

Messrs. Waterman and Porter,
Waterman, Cal.

J. S. Waterman, president. C. W. Marsh, vice-president.
E. F. Dutton.

SYCAMORE NATIONAL BANK OF SYCAMORE, ILLINOIS,
Sept. 18*th*, 1883.

GENTS: I have received, with enclosure as stated, your favor of the 12th inst. (from San Francisco). Matters are not yet in shape so that I can send your notes now or even say that the am't sent is correct, but will make proper cr. for the money, and as soon as possible have the interest figured and notes cancelled and returned if fully paid as you say.

Respectfully yours, P. M. ALDEN.

90 EXHIBIT "L."

Estate of James S. Waterman.

Jas. S. Waterman died July 19, 1883. P. M. Alden and Geo. S. Robinson, executors of last will and testament.

SYCAMORE, ILL., *July* 21, 1887.

Hon. Robt. W. Waterman, San Bernardino, Cal.

DEAR SIR: I have thought for some weeks past that I would drop you a line asking you, as a friend, what the bringing of this suit by you and some other heirs means, it being understood and said that you are the prime mover in the whole matter, charging the executors and trustees of this estate with all manner of derelictions, &c., &c., asking that we be punished and removed from office. Of course, if I have not given satisfaction I should be glad to be shown in a kindly way my errors, hoping to correct the same, and had the heirs wished me to resign and have nothing more to do with these matters I should have been glad to have stepped down and out; that would have been a real pleasure; but when it comes to kicking a fellow out (if that is what is being attempted), then I object most strenuously, and will fight it to the bitter end, knowing as I do that I have served faithfully and in all things tried to do my whole duty. This may be a little blunt (plain talk), but it is my way, and in your answer, whatever it may be, I hope that you will be equally frank.

How do you do, and what's the news at your end of the line? All pretty well here; wonder if Woodworth is not now in Cal.

As ever, very truly yours, P. M. ALDEN.

91 Ex. E.

I, James S. Waterman, of the city of Sycamore, in the county of De Kalb and State of Illinois, of the age of fifty years, and being of sound mind and memory, do make, publish, and declare this my last will and testament in manner following, that is to say:

1. I desire and direct that all my just debts be paid without unnecessary delay.

2d. I give, bequeath, and devise to my beloved wife, Abbie L. Waterman, her heirs and assigns, forever, one-third of all my estate, both real and personal.

3d. I give and bequeath to Philander M. Alden, of the city of Chicago and State of Illinois, one of the executors of this my last will and testament hereinafter nominated and appointed, in trust for the use and benefit of Nellie Farnhdon, of Sycamore and State aforesaid, the sum of five thousand dollars, to have, hold, manage, and control the same for such purpose for and during the term of twenty-one years from and after the date of my decease, and that during the continuance of said trust estate as aforesaid to invest said amount to the best advantage for the said Nellie Farnhdon, and receive, col-

lect, and pay over to her, and in case of her death to her children or for their benefit, the interest or net income and profits thereof annually; and at the expiration of the said twenty-one years after my decease I give and bequeath to the said Nellie Farnhdon, her heirs and assigns, forever, the said sum of five thousand dollars. But in case of the death of the said Nellie Farnhdon leaving no issue, then the interest or net income and profits thereof to be paid to my
92 brothers and sisters, to wit, John C. Waterman, of Sycamore; Charles Waterman, of Freeport; Robert W. Waterman, of Mount Vernon, and Charlotte Waterman, of Sycamore, State of Illinois; Mary Wells, wife of Timothy D. Wells, of the State of Kansas, and Sarah E. Waterman, widow of Henry F. Waterman, deceased, of Rome, in the State of New York, in equal portions to each, the child or children of any deceased brother or sister to receive the same portion the father or mother would have received if living. And at the expiration of the said twenty-one years after the date of my decease the said sum of five thousand dollars I give and bequeath to my said brothers and sisters, their heirs and assigns, forever, to be equally divided between them, share and share alike, the child or children of any deceased brother or sister to take the same share the father or mother would have taken if living; and in case of the death of any of my said brothers or sisters leaving no issue the share such deceased brother would have taken, if living, to be equally divided among my said surviving brothers and sisters.

4th. I give, bequeath, and devise all the rest, residue, and remainder of my estate, both real and personal, to the said Philander M. Alden and George S. Robinson, of Sycamore, Illinois, the executors of this my last will and testament, hereinafter nominated and appointed, in trust for the use and benefit of my said brothers and sisters, to wit, John C. Waterman, Charles Waterman, Robert W. Waterman, Charlotte Waterman, Mary Wells, and Sarah E. Waterman, to have, hold, manage, and control the same for such purpose for and during the term of twenty-one years from and after the date of my decease, and that during
93 the continuance of said trust estate, as aforesaid, to receive, collect, and pay over to my said brothers and sisters above named the net income and profits thereof in equal portions to each annually, the child or children of a deceased brother or sister to take the same portion the father or mother would have taken if living; and at the expiration of said twenty-one years after my decease I give, bequeath, and devise to my said brothers and sisters, their heirs and assigns, forever, the said rest, residue, and remainder of my estate, both real and personal, to be equally divided between them, share and share alike, the child or children of any deceased brother or sister to take the same share the father or mother would have taken if living; and in case of the death of any of my said brothers or sisters leaving no issue the share such brother or sister would have taken, if living, to be equally divided among my surviving brothers and sisters.

5th. In case I should survive my beloved wife, Abbie L. Waterman, then, and in that event only, I give and bequeath to Marcia

Smith, wife of George H. Smith, of Mount Holyoke, State of Massachusetts, her heirs and assigns, forever, the sum of five thousand dollars; and I give and bequeath the sum of twenty-five hundred dollars to Nellie L. Babcock, of Sycamore, State of Illinois, her heirs and assigns, forever; and I give and bequeath also the sum of twenty-five hundred dollars to Jennie R. Cushman, of the same place, her heirs and assigns, forever, to be paid out of that portion of my estate hereinbefore given, bequeathed, and devised to my said wife, and the rest and residue thereof I hereby give, bequeath, and devise to my said executors in trust for the use and benefit of my said
94 brothers and sisters named in item four of this my last will and testament, to have, hold, manage, and control the same as specified therein and for and during the time therein specified, and the net income and profits thereof to be received, collected, and paid over under the same directions and to the same persons as therein specified; and at the expiration of the said twenty-one years after my decease I give, bequeath, and devise to my said brothers and sisters named in item four of this will, their heirs and assigns, forever, the said residue of that portion of my estate hereinbefore given, bequeathed, and devised to my said wife, Abbie L. Waterman, to be equally divided between them share and share alike, the child or children of any deceased brother or sister to take the same share the father and mother would have taken if living; and in case of the death of any of my said brothers or sisters leaving no issue, then the share such deceased brother or sister would have taken if living to be equally divided among my surviving brothers and sisters.

6th. I desire and direct that my executors, hereinafter nominated and appointed, —, and they are hereby, empowered to partition and set off to my beloved wife, as soon as practicable after my decease, that portion of my estate herein given, bequeathed, and devised to her; and they are hereby also empowered to sell and dispose of the remainder of my estate at public or private sale at such time or times and upon such terms and in such manner as to them shall be deemed for the best interest of my said estate, and invest the proceeds arising from such sale or sales for the benefit of my said
95 brothers and sisters, subject to the same regulations as hereinbefore specified for the management and control of my said estate.

7th. I desire and direct that any and all notes, bills, accounts, agreements, or other evidences of indebtedness against any of my said brothers or sisters held by me at the time of my decease be cancelled by my said executors and delivered up to the maker or makers thereof without payment of the same or any part thereof, except two notes I hold against John C. Waterman—one for eight thousand dollars, dated August 10th, 1870, and due Jan'y 1, 1871, and one for four thousand and six hundred dollars, dated Nov. 28, 1870, and due six months after date, and both secured by trust deed upon lands in Johnson county, State of Missouri—which notes I desire and direct to be collected and equally divided between my said brothers and sisters, the child or children of a deceased brother

or sister to take the same share the father or mother would have taken if living.

8th. I desire and direct that those persons who shall be indebted to me at the date of my decease and whose claims are amply secured by mortgages or trust deeds on real estates shall not be required by my said executors to make immediate payment thereof, and my said executors are hereby empowered to extend the time of payment of all such claims to such time or times as they may deem best upon the payment to them of the interest thereon according to the terms expressed in said claims, mortgages, or trust deeds, it being my desire not to oppress any man unnecessarily. My said executors are also authorized and empowered to give a reasonable time for the payment of other claims, in their discretion, provided they can do so without prejudice to my said estate.

96

9th. And I do hereby nominate and appoint Philander M. Alden and George S. Robinson to be the executors of this my last will and testament, hereby revoking all former wills by me made.

In witness whereof I have hereunto set my hand and seal this 28th day of November, A. D. 1870.

JAMES S. WATERMAN. [SEAL.]

The above instrument, consisting of eight pages, was, at the date thereof, signed, sealed, published, and declared by the said James S. Waterman as and for his last will and testament, in presence of us, who, at his request and in his presence and in the presence of each other, have subscribed our names as witnesses thereto.

S. ASHTON, Chicago, Ills.
F. B. COLE, Chicago.

Sycamore, Ill., Dec. 7, 1872.

I now desire and do change the executor, Geo. S. Robinson, and in his place appoint my brother, Robert W. Waterman, to act in all and every capacity the same had he been appointed at the time of this will being made. I also withdraw the amount of $2,500 as being left to Jennie R. Cushman, as she has since this will being made received from her uncle, Nelson Garrett, a fair sum, and is now well married. I therefore annul and leave this will the same as if her name had not been mentioned.

JAMES S. WATERMAN.

97 STATE OF ILLINOIS, } ss:
De Kalb County, }

I, Cassius M. Conrad, clerk of the county court in and for the county and State aforesaid, do hereby certify that the foregoing is a true, full, and correct copy of a certain instrument of writing purporting to be the last will and testament of James S. Waterman, which was on the 24th day of July, A. D. 1883, filed in said court for probate, and by said court on the 18th day of September, A. D.

1883, duly probated and admitted to record as and for the last will and testament of the aforesaid James S. Waterman, late of said county, deceased.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Sycamore, in said county, this 2d day of May A. D. 1888.

CASSIUS M. CONRAD, *Clerk.*

Endorsed: Filed May 28, 1888. Wm. H. Bradley, clerk.

98 And thereupon the complainant gave in evidence on his behalf his deposition, filed herein October 1, 1888.

In the United States Circuit Court for the Northern District of Illinois.

ROBERT W. WATERMAN, Complainant,
vs.
PHILANDER M. ALDEN *et al.*, Defendants.

Testimony of Robert W. Waterman, taken on the 25th day of September, A. D. 1888, before C. H. Oatman, a notary public in and for the county of Sacramento, in the State of California, at his office, in the city of Sacramento.

Q. What is your name, occupation, and place of residence, and are you the complainant in this cause?

A. My name is Robert W. Waterman; my occupation is at present Governor of the State of California, and I reside at Sacramento City, California, and I am the complainant in this cause.

Q. On September 8th, 1883, you appear to have written P. M. Alden that you would contest the will of J. S. Waterman as, so you state, it was his desire that said will should be destroyed. Please state how you came to write said letter, and what information
99 you had of the contents of said will at that time. If you had any letters, theretofore received, concerning the contents of said will, please attach the same to this deposition; if lost, state what efforts you have made to find the same, and give their contents.

A. In January, 1883, my deceased brother James was with me at the mines at Waterman, in San Bernardino county, California. On our way home to San Bernardino, by team, he talked about making a will. I asked him if he had ever made a will. He said he had, but should destroy that will and make another. After we had returned to San Bernardino he went to my lawyer twice to make another will, and once in San Diego, in the same year, he spoke to me concerning his will, and said he should destroy his old will and make a new one. After his death I received a letter from some of the relations, stating that there was no will except the old one, and that by it the property was all tied up for twenty-one years. This was all the information I had about the will at the date of my letter

of September 8th, 1883. I never saw a copy of the will until about ten days after September 8th, 1883. I was dissatisfied with the provisions of that will as written to me by some of the relatives, because it tied up the property for twenty-one years, and I knew from the conversations with my brother, which I have related, that he intended to make a different disposition of his property. I think that the first letter conveying to me the substance of the will was from my brother John. Those letters are lost or mislaid. I have made efforts to find them, but without success. I have looked among my letters and made a thorough search among my
100 letters preserved at my house in San Bernardino, and wherever else I thought it possible they might be, but have been unable to find any of them. The reason I wrote the letter of Sept. 8th, 1883, was on account of my dissatisfaction with the will and my knowledge of my brother's intention to destroy it, as above stated.

Q. On September 12, 1883, "Waterman and Porter, per J. S. W.," appear to have written said Alden from San Francisco remitting $11,504.51. Please state who J. S. W. is and how he came to make the remittance mentioned. How far is Waterman, Cal., from San Bernardino?

A. J. S. W. is my son. I had given him an order that whenever there was any balance in bank to remit it to my brother. I gave him that order at least six months before he sent that money. My son, J. S. Waterman 2nd, was secretary for Waterman & Porter, and resided at the mine, and had full charge of our business there. The distance from Waterman to San Bernardino is seventy-five miles, and at that time there was no communication between the places by railroad or telegraph. All communication had to be by team. Waterman and Porter were indebted to my deceased brother, J. S. Waterman, between twenty-five and thirty thousand dollars. The indebtedness of Waterman and Porter to my deceased brother was past due, and the standing order given to my son, J. S. Waterman, was that whenever there was any money on hand over and above what was necessary for running expenses of the mine to remit it to my brother. I did not know of his making this remittance
101 of $11,504.51 alluded to in the interrogatory until after it had been made; then it was reported to me.

Q. State whether or not, in the month of August, 1883, or prior thereto, you received from Mr. John C. Waterman a copy of the will of J. S. Waterman, and whether or not you during said August or prior thereto expressed any opinion concerning said will in any correspondence with John C. Waterman or otherwise.

A. To the best of my recollection, I did not receive a copy of my brother, J. S. Waterman's, will from my brother, John C. Waterman, or any other person, in the month of August, 1883, nor at any time prior to about September 18th, 1883. I may have had correspondence in reference to the will with John C. Waterman or others as early as August, 1883, or prior thereto, but do not remember it. If in any such correspondence I expressed any opinion about the will it must have related to the provision tying up the property for

twenty-one years and my brother's intention to destroy it, which was all I knew about it prior to September 18th, 1883.

Q. State whether or not you ever wrote or saw a letter dated September 8th, 1883, or other letters or correspondence showing you was conversant with the contents of the will of James S. Waterman at any time prior to the payment of said sum of $11,504.51, mentioned in said letter of Sept. 12, 1883?

A. I have no recollection of having ever written or seen a letter dated September 8th, 1883, except a letter from myself to P. M. Alden, relating to my brother's will, and have no recollection
102 of any letter to anybody showing that I was conversant with the provisions of my brother's will, except as to the provision tying up the property for twenty-one years, at any time prior to September 18th, 1883.

Q. State whether or not John C. Waterman, during August, 1883, or prior, to your knowledge, sent a copy of the last will of said James S. Waterman.

A. I did not receive a copy of the will from John C. Waterman or any other person prior to September 18th, 1883, to the best of my knowledge.

Q. State whether or not in your conversations with P. M. Alden, in Syacamore, in the fall of 1883, anything was said about your knowledge of item or clause 7 of said will of J. S. Waterman, regarding release, etc, of obligations, etc., against brothers and sisters of said J. S. Waterman, prior to the payment of $11,504.51?

A. In my conversations with P. M. Alden, at Sycamore, Illinois, in the fall of 1883, he stated that he had taken advice of counsel and was advised that I could not recover my share of the money paid or remitted by J. S. W. Sept. 12, 1883, because it was paid on a joint obligation of myself and a third party. Nothing was said about my knowing the contents of clause seven of the will at the time of or prior to the remittance of said $11,504.51.

Q. Mr. Alden has said that he understood from a letter dated Sept. 8, '83, and from other correspondence, one letter received on the same day, that the substance of those letters showed conclu-
103 sively that you was conversant of all the conditions of the will in question; what have you to say concerning that statement?

A. I was not conversant with the provisions of the will in question prior to September 18th, 1883, and could not have written any letter from which it could be inferred that I was so conversant.

Q. When did you first know the contents of said will, and particularly of clause 7 thereof?

A. I did not know the contents of the will, and especially I did not know the contents of clause seven, until I received a copy of the will from my brother John, on or about September 18th, 1883.

Q. Do you know or can you state and set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. I do not think of anything in addition to what I have already stated which may be of advantage to either party in this cause or material to the subject of this examination, unless it be that in all my conversations with Mr. Alden upon the subject of this case he has admitted the justness of my claim, and put his approbation solely upon the ground that as executor and trustee he was bound to oppose the payment of my share of money paid by Waterman and Porter for the sole reason that it was not my personal debt, but a joint obligation of myself and another person.

104 R. W. WATERMAN.

Subscribed and sworn to before me this 25th day of September, 1888.

[SEAL.] C. H. OATMAN,
Notary Public.

WILLIAM R. PLUM,
Solicitor for Complainant.

(Endorsed:) Filed Oct. 1, A. D. 1888. Opened Oct. 4, A. D. 1888. For complainants. Wm. H. Bradley, clerk.

105 The foregoing was all the evidence introduced and offered in said cause by either party, which fact the court certifies, and this certificate is signed, sealed, and made part of the record hereof accordingly.

M. W. FULLER, *Ch. Justice.* [SEAL.]

(Endorsed:) Filed Aug. 3, 1889. Wm. H. Bradley, clerk.

106 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the cause wherein Robert W. Waterman is complainant and Philander M. Alden and George S. Robinson, individually and as executors of the last will and testament of James S. Waterman, deceased, are defendants, as the same appear from the records and files of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, northern division, this nineteenth day of September, 1889.

WM. H. BRADLEY, *Clerk.*

Appellant's Assignment of Errors.

UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States. October Term, A. D. 1889.

107 ROBERT W. WATERMAN, Appellant,
vs.
PHILANDER M. ALDEN, GEORGE S. ROBINSON, Individually and as Executors of the Last Will of James S. Waterman, Deceased, Appellees. } Bill in Equity.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Robert W. Waterman, by William R. Plum, his solicitor, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1st. For that the court dismissed complainant's bill for want of equity.

2d. For that the court should have granted the relief prayed for in said bill.

3d. For that the court should at least have adjudged and decreed that said executors, as such, were liable for the repayment of the moneys sought by said bill to be recovered.

4th. Otherwise, for that the court should at least have adjudged and decreed said executors to repay three-fourths of said moneys.

And said Robert W. Waterman prays that the decree aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of said decree.

ROBERT W. WATERMAN, *Appellant,*
By WILLIAM R. PLUM.
His Solicitor and Counsel.

Endorsed on cover: N. Illinois C. C. U. S. No. 1286. Robert W. Waterman, appellant, *vs.* Philander M. Alden and George S. Robinson, individually and as executors of James S. Waterman, deceased. Filed October 3, 1889.